

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 1, 1957, through December 31, 1958

RICHARD W. ERVIN
Attorney General



Tallahassee, Florida
1959



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RICHARD W. ERVIN
ATTORNEY GENERAL

STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

January 6, 1959

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE LEROY COLLINS
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1957 through December 31, 1958. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

This report includes opinions of general interest rendered during two calendar years, advisory opinions of the Supreme Court to the Governor, a listing of former Attorneys General, the constitutional and statutory duties of the Attorney General and the personnel of my office during the past two years. Opinions are numbered numerically as released and identified by the year and number beginning with opinion No. 1 as "57-1."

Statutes and constitutional sections cited and subject index may be found in the last portion of the report.

Respectfully submitted,
RICHARD W. ERVIN
ATTORNEY GENERAL

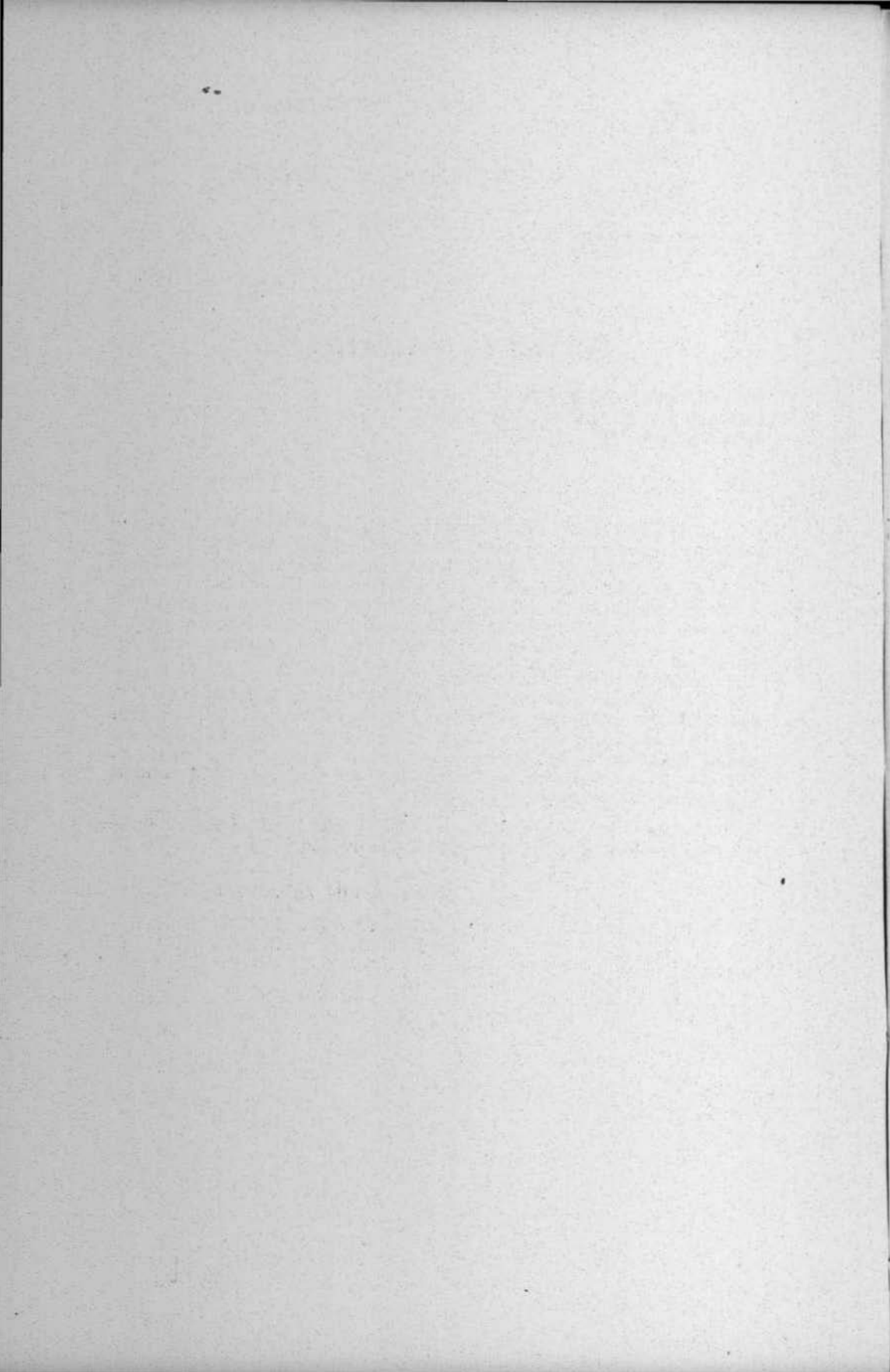


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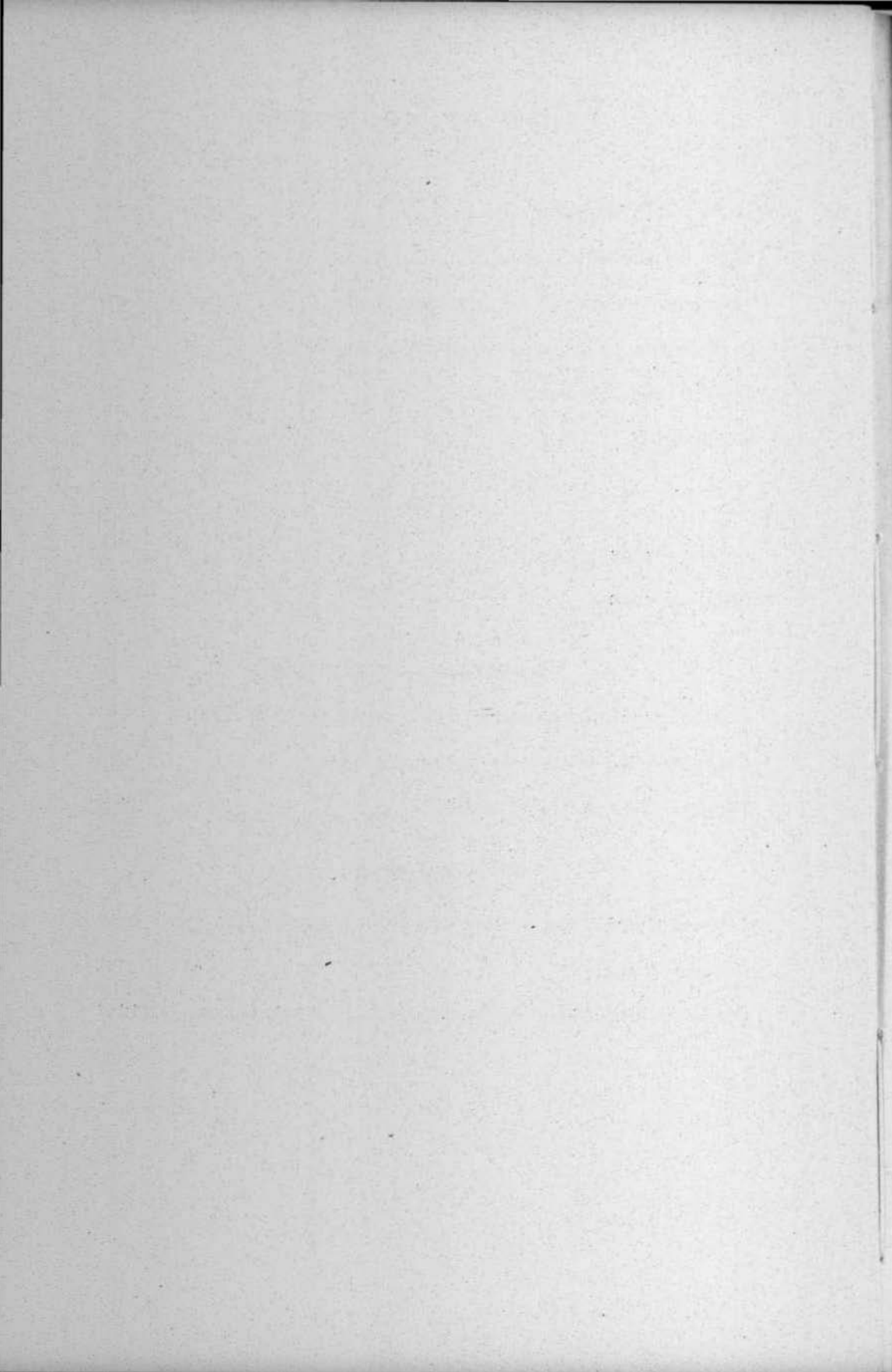
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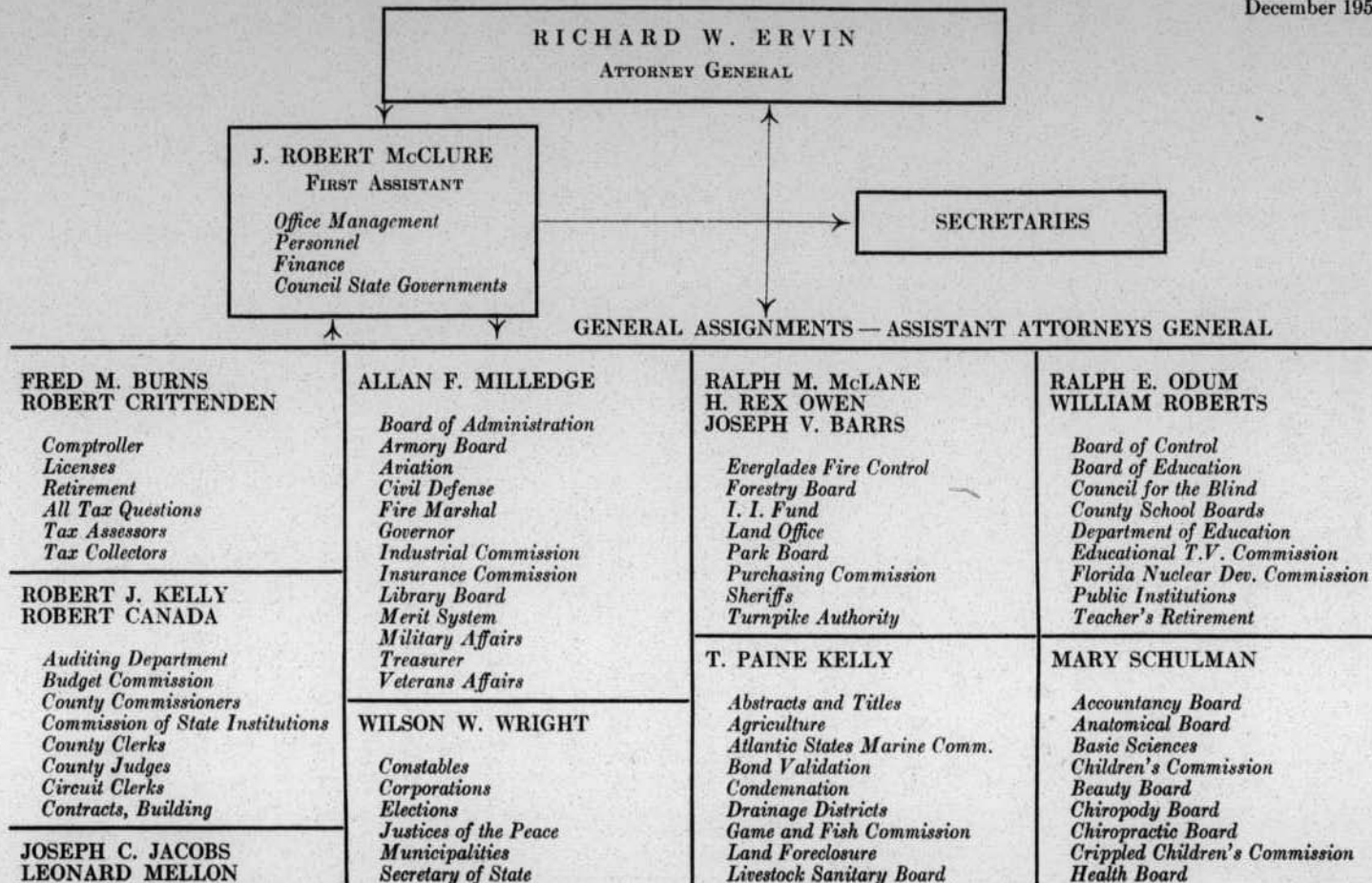
ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1846-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESTCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941
J. TOM WATSON	1941-1949
RICHARD W. ERVIN	1949-

ORGANIZATION OF ATTORNEY GENERAL'S OFFICE

December 1958



Avocado and Lime Commission
Citrus Commission
Conservation Department
Dental Board
Development Commission
Flood Control
Homesteads
Labor Relations
Motor Vehicle Commission
Public Safety
Securities Commission
T.B. Board
Watchmakers Commission
Water Resources
Welfare Board

Small Claims Courts

B. JAY OWEN

Alcoholic Rehabilitation Board
Egg Commission
Escheatments
State Hospitals

MIAMI AREA:

PHILLIP GOLDMAN
Comptroller
General Litigation

Market Board
State Road Department

OPINIONS SCREENING COMMITTEE

FRED M. BURNS
RALPH E. ODUM
RALPH M. McLANE

CHARLES VOCELLE
Pest Control
I.I. Fund
General Litigation

Harbor Masters
Juvenile Courts
Land, Oil, Gas, Water
Medical Board
Milk Commission
Mosquito Control
Massage Board
Nurses
Optometrists
Psychology
Pest Control
Pilot Commission
Physical Therapists
Real Estate Commission

SPECIAL DEPARTMENTS

CRIMINAL APPEALS DIVISION

REEVES BOWEN, Director
GEORGE GEORGIEFF
ODIS HENDERSON
EDWARD S. JAFFRY
EUGENE SPELLMAN
DAVID U. TUMIN
IRVING B. LEVENSON } *Miami Office*

Appellate Courts
Criminal Appeals
Criminal Courts
County Solicitors
Extradition
Habeas Corpus
Pardon Board
Parole Commission
Prosecuting Attorneys
State Attorneys
Uniform Support of Dependents

STATUTORY REVISION

C. TOM HENDERSON, Director
ROSE D. KITCHEN
SALLYE C. FLOURNOY
T. DAVID BURNS

Biennial Report
Bill Drafting
Bulletins
Council of State Governments
House and Senate Journals
Index and Tables
Publication of Official Florida Statutes
Special Indexes
Statutory Revision
Summary of Laws Passed by Legislature

LAW ENFORCEMENT

GEORGE E. OWEN, Director
ED McCOLLUM
A. A. TELESE

Barber Board
Beverage Department
Bookie Bill
Engineers
Funeral Directors
Hotel Commission
Narcotics
Osteopaths
Pharmacy Board
Racing Commission
Railroad Commission
Weights Division, State Road Department

ATTORNEY GENERAL'S OFFICE

LEGAL DEPARTMENT

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J. ROBERT McCCLURE	First Assistant
*HOWARD S. BAILEY	Assistant
*JOHN J. BLAIR	Assistant
REEVES BOWEN	Assistant
FRED M. BURNS	Assistant
GEORGE R. GEORGIEFF	Assistant
PHILLIP GOLDMAN	Assistant
*JAMES L. GRAHAM, JR.	Assistant
ODIS HENDERSON	Assistant
JOSEPH C. JACOBS	Assistant
EDWARD S. JAFFRY	Assistant
ROBERT J. KELLY	Assistant
T. PAINE KELLY	Assistant
IRVING B. LEVENSON	Assistant
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*JOHN D. MORIARTY	Assistant
RALPH E. ODUM	Assistant
B. JAY OWEN	Assistant
GEORGE E. OWEN	Assistant
H. REX OWEN, JR.	Assistant
*JOHN C. REED	Assistant
MARY SCHULMAN	Assistant
EUGENE P. SPELLMAN	Assistant
DAVID U. TUMIN	Assistant
*J. ERNEST WEBB	Assistant
WILSON W. WRIGHT	Assistant
*MILDRED S. AKERMAN	Special Assistant
JOSEPH V. BARRS	Special Assistant
ROBERT CANADA	Special Assistant
ROBERT R. CRITTENDEN	Special Assistant
LEONARD R. MELLON	Special Assistant
*EDWARD J. NELSON	Special Assistant
WILLIAM J. ROBERTS	Special Assistant
CHARLES L. VOCELLE	Special Assistant
*JESSE F. WARREN	Special Assistant
LILLIAN S. RYDER	Secretary to Attorney General
BETTY F. EPPES	Secretary to First Assistant
BETTYRE POWELL	Secretary
BESSIE MARY ALLEN	Secretary

*Resigned

ALICE L. BENNES	Secretary
*BETTY BRANT	Secretary
*CARRIE LOU CHAMBLISS	Secretary
LEILA K. COFIELD	Secretary
MARIANNE C. CUNNINGHAM	Secretary
*CAROLINE L. DEDGE	Secretary
PAULINE H. EVANS	Secretary
MARY JANE GIBBS	Secretary
*ANN GRANGER	Secretary
MAUDIE E. HART	Secretary
*ANN JACKSON	Secretary
*ANNE C. JENKINS	Secretary
NINA LEE KINSEY	Secretary
BETTY B. KIRBY	Secretary
WINIFRED KITCHING	Secretary
*BETTY M. LEE	Secretary
ELLEN G. LLOYD	Secretary
*MILDRED L. MATTOX	Secretary
IRIS Y. McDOUGALD	Secretary
JUANITA S. PATTON	Secretary
ANNIE MARY PERKINS	Secretary
RUTH W. PHILIPS	Secretary
MINNIE D. PHILLIPS	Secretary
MAE ELLEN ROOT	Secretary
PEGGY SUE RUSS	Secretary
MARTHA G. SMITH	Secretary
JOSEPHINE VIGEANT	Secretary
NELLIE JO VON FUNK	Secretary
LILLIAN H. WALKER	Secretary
BETTY HALL YON	Secretary
MARGUERITE E. KEEGAN	File Clerk
AUGUSTA D. TURNLEY	Assistant File Clerk
FRED E. CRAWFORD	Investigator
*DONALD I. HARTSFIELD	Investigator
ED McCOLLUM	Investigator
*GARY A. SAMMONS	Investigator
A. A. TELESE	Investigator
LIDIE E. MOSS	Receptionist
HORTENSE K. WELLS	Librarian
MICHAEL PATRONIS	Machine Room Supervisor
TIMOTHY E. GAINOUS	Janitor
**ROBERT LANDERS	Janitor-Machine Operator
DAN J. STARKS	Janitor
HATTIE HOLLINGSWORTH	Maid
RUTH N. LANDERS	Maid

*Resigned
**Deceased

ATTORNEY GENERAL'S OFFICE

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CHARLES TOM HENDERSON.....Director of Statutory
Revision and Bill
Drafting, Assistant
Attorney General

SALLYE C. FLOURNOY.....Editor, Assistant

ROSE D. KITCHEN.....Indexer, Editor, Assistant

T. DAVID BURNS.....Special Assistant

*C. A. NEELEY.....Editor, Assistant

JEWELL R. ROEMER.....Editor, Secretary

HILDA F. LIPSEY.....Secretary to the Director

MARY O'Q. POMEROY.....Secretary

*SHIRLEY SWAIN HUGGINS.....Secretary

HILDRED Y. CASEY.....Part-time Secretary

VIVIAN J. GOULD.....Secretary

*MARTHA S. PATTERSON.....Typist

*MILDRED L. MADDOX.....Typist

DOROTHY M. STARK.....Proofreader

MAMIE M. HARRELL.....Proofreader

CAROLYN M. ERVIN.....Clerk

DORA BELLE BROOKS.....Clerk

CATHERINE COMISKEY.....Clerk

BETTY B. HAYWARD.....Clerk

*DONALD I. HARTSFIELD.....Machine Operator

*Resigned

EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of Omitted Opinions listed immediately preceding the Alphabetical Index.

BIENNIAL REPORT

EDITORIAL STAFF

J. ROBERT McCLURE	<i>First Assistant</i>
CHARLES TOM HENDERSON	<i>Assistant</i>
SALLYE C. FLOURNOY	<i>Editor</i>
ROSE D. KITCHEN	<i>General Indexing</i>
JEWELL R. ROEMER	<i>Citator</i>
DOROTHY M. STARK	<i>Proofreader</i>
MAMIE M. HARRELL	<i>Proofreader</i>

BIENNIAL REPORT
of the
ATTORNEY GENERAL
State of Florida

January 1, 1957, through December 31, 1958

057-2—January 4, 1957

EDUCATION

**PERSONNEL SCHOOL SYSTEM, CONTINUING CONTRACTS—
LEAVE OF ABSENCE—§§231.36 AND 231.39, F. S.**

*To: Thomas D. Bailey, Superintendent of Public Instruction,
Tallahassee*

QUESTION:

If a written request for a leave of absence from instructional duties was made by an employee and duly granted by a board of public instruction to assume duties of a county elective office in the administrative capacity of county superintendent, has the individual concerned lost his rights under the continuing contract law, §231.36, F. S.?

Section 231.36, F. S., provides that a teacher possessing certain designated qualifications, "... who has completed three years of service ... and who has been reappointed ... for the fourth successive year, shall be entitled to ... a continuing contract ... Each person to whom a continuing contract has been issued ... shall be entitled to continue in his position ... without the necessity for annual nomination or reappointment until such time as the position is discontinued, the person resigns or until his contractual status is changed as prescribed below."

It seems clear that §231.36, F. S., contemplates continuous employment of the teacher (or other personnel included). No provision is made in this section for leaves of any kind.

Section 231.39, F. S., does provide for certain kinds of leaves such as sick leave, professional leave or personal leave *during* the school year only.

Section 231.39 (1), F. S., also provides:

EXTENDED PROFESSIONAL LEAVE—Extended leave for professional improvement may be granted for a period of not to exceed one year to any member of the instructional staff who has served satisfactorily and successfully in the schools of the county for a period of three or more years; provided, that partial compensation may be authorized only when the person has served in the county for seven or more years.

Section 231.39 (2), F. S., applies only to military leave, which is not material to your question.

From the above it appears that leave cannot be granted for any purpose (except military leave) for more than one year.

The facts set forth in your question state that the teacher in question was granted a leave for the purpose of serving as county school superintendent. This form of leave does not appear to fall within the category of those authorized; i.e., sick leave or leave for professional improvement. It could not be classified as "personal" leave which is only authorized for a brief time during the school year.

Furthermore, the leave granted the teacher in question had no termination date. In other words, it was for an indefinite time, which is clearly at variance with the provision of §231.39 (1) quoted above which limits extended professional leave to "a period not to exceed one year."

In view of the above, your question must be answered in the affirmative, assuming that the individual in question accepted the leave and was absent from his teaching job during the past four years.

057-3—January 4, 1957

TAXATION AND FINANCE

REIMBURSEMENT BY TAX ASSESSOR OF SUMS PAID EMPLOYEES OF BOARDS OF COUNTY COMMISSIONERS WORKING IN ASSESSOR'S OFFICE—§193.111, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

May a county assessor of taxes reimburse the board of county commissioners sums paid by it in connection with the employment of clerks to work in the tax assessing office in connection with an appraisal of all taxable property, under the provisions of §193.111, F. S., or a like or similar law?

We are not advised of any express agreement on the part of the county assessor of taxes to make the reimbursement above mentioned, although it appears from the file handed us with the request for opinion that the county has billed the assessor of taxes for such reimbursement. If there is any obligation for the making of such reimbursement, it must be an implied one or one required by law.

Section 193.111, F. S., seems to treat county-wide appraisements thereunder as a county project and not one of the assessor of taxes. Although the original of the appraisal is required to be filed in the office of the county assessor of taxes, we find nothing in the statute which requires the assessor of taxes to use or be bound by the said appraisal. Doubtless the county assessor of taxes has the power and authority, when the income of his office will permit same, to make a complete revaluation of all taxable property in the county in connection with his assessment duties unconnected with said §193.111, F. S. Although we do not here decide, it may be that the assessor of taxes may have the power and authority to cooperate with the board of county commissioners in the making of an appraisal under §193.111, F. S., and use a part of the income of his office for such purpose (when properly budgeted); however, we find nothing in the file indicating any such cooperation in this case.

Without deciding the application of Ch. 29451, 1953, or §193.02, F. S., as applicable law regulating the making of the annual office

budget of the county assessor of taxes, it seems evident that under either law the county assessor is bound by his office budget as fixed and adopted by the applicable budgeting authority. This being true, unless provision was made in the 1956 budget of the county assessor of taxes for such reimbursement, it is doubted that he has authority to make such reimbursement in the absence of some statute or law expressly requiring such payment superior in application to the budget statute or law under which the office budgets were prepared, adopted and approved. As it appears from the file that the said clerks were paid by the board of county commissioners from county funds, we must presume that provision for such payments was made in the budget of the said board of county commissioners.

It, therefore, appears that the above stated question should be answered in the negative unless provision therefor be made in the applicable office budget of the county assessor of taxes or there be some statute or law requiring the payment thereof notwithstanding the failure of the office budget to provide for payment. Not being advised of any contract for such payment by and between the county assessor of taxes and the board of county commissioners, we here presume that there was no such agreement, and here refuse to pass upon the validity of such an agreement should one exist until furnished with a copy thereof and full details.

057-4—January 4, 1957

STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM — PUBLIC RE-EMPLOYMENT —
§122.16, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where a county employee, retired under the provisions of Ch. 122, F. S., accepts employment by a public accountant, who does auditing work and directs the keeping of accounts in a state or county office, and as a part of his employment assists his employer with auditing the accounts of such office and assists in directing the keeping of its accounts, does such retired employee violate §122.16, F. S.?

Under said §122.16, F. S., any person retired under said Ch. 122, F. S., who accepts employment "in any capacity whatsoever by the state or any political subdivision or any department, branch or agency thereof," is not eligible to receive further retirement compensation, with certain exceptions not here material. The above question clearly contemplates an employment under which work on or in connection with state or county offices or office records will or may be performed; however, such work will be done for and in behalf of another who is the employee of the state or county or an officer, board or agency thereof. There is no employment of the retired county or state employee by the state or a county thereof or an agency, branch or department thereof.

The above question is, therefore, answered in the negative, unless it should be found that the employment was not an employment in good faith, but one designed to avoid the requirements of said §122.16, F. S.

057-5—January 7, 1957

JUDICIARY DEPARTMENT

STATE AND ASSISTANT STATE ATTORNEY'S RESIDENCE
—§§27.20-27.22, F.S. §§15, 45, 47, ART. V, STATE CONST.

To: *LeRoy Collins, Governor, Tallahassee*

STATEMENT OF FACTS:

The fifth circuit is composed of the counties of Citrus, Hernando, Lake, Marion and Sumter. On July 31, 1955, John W. McCormick, resident of Lake county, was commissioned as assistant state attorney for said circuit for a term expiring July 31, 1959. At the 1956 general election, G. G. Oldham, Jr., resident of Lake county, was elected state attorney for said circuit for a four-year term, beginning Jan. 8, 1957. Section 27.20, F. S., provides in part that in the circuits composed of two or more counties the state attorney and the assistant state attorney shall not reside in the same county.

QUESTION:

In view of the stated circumstances, what is the effect of the provisions of said statute in relation to the continued residence in Lake county of said state attorney when he shall take office and of said assistant state attorney?

Notice is taken of the mentioned provisions of §27.20, F. S. For further provisions relating to places of residence of state attorneys and assistant state attorneys with respect to the same county or a specified county, see §§27.19, 27.21 and 27.22, F.S., and 27.20(1), (2), (3) and (4), F. S.

The office of assistant state attorney is a statutory one. (*Owens v. State, Fla.*, 61 So. 2d 412). With possible exception of the provision in §27.22 pertaining to described circuits, an assistant state attorney is appointed by the governor by and with consent of the senate for a four-year term, the exception noted providing that in those circuits affected by §27.22, the term of office of assistant state attorneys expires with that of the state attorney.

Prior to the 1956 primaries, this office advised Mr. Oldham that the fact that he was a resident of the same county as the named assistant state attorney had nothing to do with his right to run for the office of state attorney in that circuit.

The office of state attorney is a constitutional one. The original provision relating to the office is found in §15, Art. V, State Const., to the effect that the governor, by and with the consent of the senate, shall appoint a state attorney in each judicial circuit, "whose duties shall be prescribed by law, and who shall hold office for four years." At the 1944 general election, by vote of the electors §47 was added to said Art. V, which in effect prescribed that beginning with the general election in 1948, and thereafter, state attorneys should be elected for four-year terms. Construing these two constitutional provisions, it appears that there shall be one state attorney for each judicial circuit, and that such office is now an elective one, the cycle of the four-year term of office being fixed by the beginning of the first elective term on "the first Tuesday after the first Monday in January, 1949." At this point it is well to note that there is a provision in §45, Art. V,

State Const., relating to circuit judges, as follows: "(d) In circuits having more than one judge the legislature may designate the place of residence of any additional judge or judges." There is no similar provision relating to state attorneys.

These provisions relating to this constitutional office of state attorney are to be observed. On the other hand, it is the well-recognized rule of our courts (and those of other jurisdictions) that qualifications beyond those set forth in the constitution with respect to a constitutional office are vulnerable. An excellent example of the application of this rule is found in *Thomas v. State ex rel Cobb*, Fla., 58 So. 2d 173. The case dealt with a legislative attempt to require educational qualifications for the constitutional office of county superintendent of public instruction not specified in the constitution; and the court held such act invalid.

There is no requirement in the constitution that a person elected state attorney shall or shall not reside in a particular county in his judicial circuit; and any legislative requirement to that effect would not be warranted by the constitution. On the other hand, it lies within the legislative power to fix county residence of an assistant state attorney in a judicial circuit. Any person appointed assistant state attorney takes the office with full knowledge of and subject to the provisions of §27.20, F. S.

In view of the foregoing, in my opinion the question is answered as follows:

The above-quoted words from §27.20, F. S., do not affect the right of the duly elected and qualified state attorney for the fifth judicial circuit to reside in any county in that circuit. Hence, if the newly-elected state attorney continues to reside in Lake county, the involved assistant state attorney, if he desires to retain his office for the balance of his appointed term, must reside in a county in such circuit other than Lake county. It is therefore suggested that the governor notify this assistant state attorney of the above conclusions; that by reason thereof, if the newly-elected state attorney continues to reside in Lake county after he takes office, should such assistant state attorney not move his residence to another county in said circuit within a time to be fixed by the governor, the latter consider the office vacant and subject to be filled by appointment. It may be that the governor might see fit to grant sufficient time to said assistant state attorney to seek declaratory decree in a proper proceeding with respect to the question.

The above opinion may seem harsh and is given with reluctance. However, there is involved the very important matter of the qualification of this assistant state attorney in relation to the functions of his office.

057-6—January 7, 1957

TAXATION

HOMESTEAD TAX EXEMPTION—EFFECT UPON AREA BY INCLUSION BY INCORPORATION IN MUNICIPALITY— ART. X, STATE CONST.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Is the area of a homestead, upon which homestead tax exemption has been granted, reduced in area upon its being incorporated into a municipality?

Section 7, Art. X, State Const., provides homestead tax exemption to the owners of real property in this state who make their permanent home upon said property, "up to the assessed valuation of \$5,000 on the said home and contiguous real property as defined in Art. X, §1, of the constitution." A homestead, under §1, Art. X, State Const., may consist up to 160 acres of land and improvements outside of municipal corporations or one-half acre of land, including the owner's home and business house, within municipalities. The homestead must be composed of a contiguous area of land (*Brandies v. Perry*, 39 Fla. 172, 22 So. 268; *Milton v. Milton*, 63 Fla. 533, 58 So. 718), except in rare cases (*Clark v. Cox*, 80 Fla. 63, 85 So. 173, text 174).

Section 7, Art. X, State Const., was proposed as an additional section to said article, by the legislature of 1933, and adopted at the general election in 1934, and was amended in 1938 in its present form. The proposed amendment to said Art. X, submitted by the legislature of 1933, came before the supreme court, prior to its adoption, which court, in *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270, text 271, stated that if adopted it would modify "Section 1, Art. IX, as well as §1, Art. X, if not also other sections of the state constitution." The court, in *L'Engle v. Forbes*, Fla., 81 So. 2d 214, text 216, in construing §7, Art. X, State Const., applied rules previously followed in construing §§1 and 4 of said Art. X. "Generally an amended constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law." (11 Am. Jur. 663, §54). A constitutional amendment should be construed in *pari materia* with all other portions of the constitution having a bearing upon the same subject (*Sylvester v. Tyndall*, 154 Fla. 663, 18 So. 2d 893, text 900). This rule seems to be applicable to both amendments of statutes as well as constitutions (50 Am. Jur. 481, §468). We, therefore, hold that §5, Art. X, State Const., is applicable to §7, Art. X, as well as to §1, Art. X, of the said state constitution.

Said §5 of Art. X provides that "no homestead provided for in §1 shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, *without the consent of the owner.*" (Emphasis supplied.) This provision was new in the 1885 state constitution. It did not appear in the first drafts of the proposed constitution in the journals of the constitutional convention, but was offered as an amendment from the floor, by Hon. John D. Broom of Volusia county, who was later to become one of the circuit judges of the state, and adopted without change in language or punctuation. The article deals primarily with homesteads and exemptions and not with the incorporation of municipalities; the subject matter of the article is homesteads, not municipalities. The consent mentioned in said §5, Art. X, seems to relate to the reduction of the homestead area, not the incorporation of municipalities. The fact that a homestead owner makes no express objection to the inclusion of his homestead within the corporate limits of a municipality would not seem to evidence any consent to a reduction of the area of his or her homestead. The homestead may not be reduced in area without the consent of the owner, and this consent seems to be one that must be evidenced by the owner, either directly or by strong implications. This consent is one that should be determined from existing evidence by the tax assessor, not negatived by the taxpayer. The fact that the homestead owner may have voted at a referendum

election upon the inclusion of the area into the municipal limits is not evidence of a consent to a reduction of the homestead area. The fact that the homesteader may have voted for inclusion may be taken into consideration by the tax assessor in determining such consent; however, the fact of so voting is not of itself sufficient to prove consent but may be taken into consideration, with other evidence, in determining the question. There should be a clear preponderance of evidence indicating a consent to reduction in area before such area is reduced by the tax assessor or the board of equalization.

The above question is, therefore, answered in the negative; unless express consent to a reduction be given the tax assessor or there be evidence clearly showing an implied consent to reduction in area.

057-7—January 14, 1957

EDUCATION

AUTHORITY OF PUBLIC SCHOOL PERSONNEL—CORPORAL PUNISHMENT—CHILD WELFARE—§§231.09 (4), 232.26 AND 232.27, F. S.

To: Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Can the principal delegate the authority to the teacher to use corporal punishment or must the teacher consult the principal each and every time he or she deems it necessary to use corporal punishment?

2. What is degrading punishment?

Section 231.09 (4), F. S., relating to the duties of instructional personnel provides:

TREATMENT OF PUPILS. — Treat pupils under their care kindly, considerately, and humanely, administering discipline in accordance with regulations of the state board and the county board; provided, that in no case shall cruel or inhuman punishment be administered to any child attending the public schools.

Section 232.26, F. S., provides, in part, "subject to law and rules and regulations of the state board and of the county board, the principal or teacher in charge of a school may delegate to any teacher or other member of the instructional staff or to any bus driver transporting pupils of the school such responsibility for the control and direction of the pupils as he may consider desirable"

Section 232.27, F. S., provides:

Authority of teacher.—Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. Under no circumstances may a teacher (except of a one-teacher school) suspend a pupil from school or class.

I find no state board regulation which is applicable to your

question. We do not have available all county school board regulations; therefore, if such local regulations exist they should be considered by local school authorities, together with and supplemental to this opinion.

It should be noted that §232.26, F. S., does not specifically authorize a principal to delegate to a teacher authority to act independently in administering corporal punishment.

Section 232.27, F. S., does specifically provide that teachers must consult the principal or teacher in charge of the school before inflicting corporal punishment.

AS TO QUESTION 1:

It is my opinion that a principal may not delegate to teachers authority to use corporal punishment and that teachers must consult the principal on each occasion they may consider it necessary to use such punishment.

AS TO QUESTION 2:

Black's Law Dictionary, 3rd Ed., defines "degrading" as follows: "Reviling; holding one up to public obloquy; lowering a person in the estimation of the public." In my opinion, any form of punishment of school children, physical or psychological, which results in genuine degradation as above defined, is contemplated and prohibited by §232.27, F. S.

057-8—January 14, 1957

JUDICIARY DEPARTMENT

SHERIFF'S FEES—DETENTION OF DELINQUENTS—§§39.03
(1), 39.06(9) AND 125.45(2)(g), F. S.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs' Ass'n,
Tallahassee

QUESTION:

Where a sheriff arrests a person for violation of a criminal statute of Florida, transports such person to the county jail and he is there "booked" and otherwise processed, but subsequently it is determined said person is a "child" within the meaning of Ch. 39, F. S., and said "child" is turned over to the juvenile court for disposition, is the sheriff entitled to the usual fees provided by law for arrests, etc.?

Even though a sheriff may know that a person charged with violation of law is a child within the meaning of the juvenile court law, he is under a duty to take such child into custody (§39.03(1), F. S.) and thereafter comply with the provisions of said law. It is recognized that under the juvenile court law a child is never "arrested" within the technical sense of the term as used in criminal proceedings, but he is taken into custody to be released to the juvenile court for disposition.

In opinion 051-447, dated Dec. 6, 1951 (AGO 1951-1952, p. 241), we were considering the persons or cases which would fall within the term "criminals" as set forth in §125.45(2)(g), F. S., providing that the board of county commissioners should pay certain expenses of the sheriff in connection with the "apprehension of criminals." We construed the words in their broadest sense, holding that cases involving delinquent children who, although not classified as criminals were charged with violation of criminal statutes, are included.

Where a sheriff is required in the course of his duties to take a person charged with violation of law into custody, it is not contemplated that he do so without receiving some form of compensation. As a matter of fact, §39.06(9), F. S., contemplates that officers serving process and orders issued by the juvenile court "... shall be compensated in accordance with law out of the funds of the county set aside for that purpose, and not of the juvenile court fund."

While under the juvenile court act the individual in question could not have been arrested, but only detained, so far as the sheriff's services are concerned he has at least technically arrested the child and should not be denied his fees merely because that person is a juvenile.

The question is answered in the affirmative.

057-9—January 15, 1957

TAXATION

INTANGIBLE PERSONAL PROPERTY—COPYRIGHTS AS TAXABLE—CH. 199, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTIONS:

1. May the royalties to be received by the holder of a copyright from licensees be capitalized and assessed as intangible personal property under Ch. 199, F. S.?

2. In case of an assignment of such royalties by the copyright holder, may the interest of the assignee be assessed as intangible personal property under the above statute?

The above questions are answered in the affirmative upon the authority of our opinion 047-375 of Nov. 7, 1947 (1947-8 Biennial Report 241) and of 18 C. J. S. 162, §§19 and 20; 84 C. J. S. 404-5, §210; 34 Am. Jur. 404-5, §7; 51 Am. Jur. 302-3, §248; and authorities therein cited.

However, a distinction between the property in a copyright and in the thing copyrighted is recognized by §27, title 17, of the U. S. code, to which reference is here made.

057-10—January 16, 1957

TAXATION

STATE INTANGIBLE PERSONAL PROPERTY TAXES AGAINST HOLDERS OF HAWAII HIGHWAY REVENUE BONDS—CH. 199, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Are the highway revenue bonds issued or to be issued by the territory of Hawaii, under and pursuant to the authority vested in the territory by the act of congress of the U. S. of July 14, 1956 (Ch. 602; Public Law 716), in the hands of residents or corporations of this state subject to taxation under Ch. 199, F. S.?

It was held in *Farmers' and Mechanics' Saving Bank v. Minnesota*, 232 U. S. 516, 34 S. Ct. 354, 58 L. Ed. 706, that a state may not tax bonds issued by municipalities in the Indian territory and in the territory of Oklahoma as property in the hands of the

holders, since this would be to tax the performance of a governmental function by an instrumentality and agency of the federal government, although the bonds may not be guaranteed by either the U. S. or the central government of the territory. So far as this office has been able to ascertain the above opinion of the supreme court of the U. S. has not been overruled nor is there any legislative consent, on either the part of the U. S. or the territory of Hawaii, to the levy and assessment of such a tax.

The above question is answered in the negative so long as the above opinion is not overruled or until there be legislative consent on the part of the federal government or the territory of Hawaii to the levy of such a tax.

057-11—January 17, 1957

TAXATION

OCCUPATIONAL LICENSE TAXES—PRIVATE GOLF COURSES—§§205.15-205.19, 205.21, 205.49 and 205.53, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Are privately owned golf courses subject to state and county occupational licenses and license taxes under Ch. 205, F. S.?

"No person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required," by Ch. 205, F. S., or any other law of this state, "unless a state license, or a state and county license, or county license, as the case may be, shall have been procured from the tax collector of the county wherein the place of business may be located . . ." (§205.01, F. S.). We find nothing in the license tax statutes or laws (see §§205.15, 205.16, 205.161, 205.17, 205.18 or 205.19, F. S.) which expressly exempts golf courses and the operators thereof from the payment of occupational license taxes.

Unless a privately owned golf course is operated by the owner, by himself or through agents, or licensees or lessees, *as a business, profession or occupation*, we doubt that it would be within the purview of Ch. 205, F. S. Where a golf course is owned and maintained by a person or corporation as a recreational facility for himself or its stockholders, and used exclusively for such purposes, it would not seem to be operated *as a business, profession or occupation*; however, if others are permitted to use such golf course for a fee or for compensation, either directly or indirectly, it would seem to be operated *as a business, profession or occupation*, whether operated for a profit or not. The use and operation of the golf course and the purpose of such use would seem to be the determining factor in determining the above question. No general answer applicable in all cases may be made to the above stated question, but the question as to each golf course must be determined from the facts specifically involved as to the golf course in question. No attempt has been made in this opinion to consider the question of taxation of golf courses for ad valorem taxes.

The particular operation and manner of operation of a golf course *as a business, profession or occupation* would determine its classification under the license and license tax statutes. It would seem to fall within the purview of §§205.21, 205.49 or 205.53, F. S., depending on the use made of the golf course as a business in each particular case.

057-12—January 17, 1957

TAXATION

DOCUMENTARY STAMP TAXES—CONVEYANCES FOR ISSUANCE OF CORPORATE STOCK—§§201.02 and 608.15, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Where real property is conveyed to a corporation in exchange for the issuance of a stated number of the shares of the capital stock of the corporation, are documentary stamp taxes due upon said conveyance?

Under the statutes of this state no par corporate stock may be issued for such consideration as may be prescribed in the certificate of incorporation or by the stockholders or board of directors, and par value shares for a consideration having a value equal to the said par value (§608.15, F. S.). Property delivered to a corporation as payment for shares of its stock must be fair, just, lawful and needed equivalent for the money subscribed or the stock issued. It is the present value of the property surrendered and not the future or prospective value that must be used in issuing the stock. The burden is on one paying for corporate stock with property to show that the property was actually worth the value of the stock (13 Am. Jur. 323, §210). Under said §608.15, F. S., corporate stock must be issued for a consideration having a value at least equivalent to the par or fixed value of the stock to be issued. Where corporate stock is issued for a consideration consisting of real or personal property there is a presumption that the consideration of the property was considered to be not less than the par or fixed value of the stock issued therefor.

Under federal tax regulation 113.83, a conveyance of realty in exchange for other property, and a conveyance of realty to a corporation in exchange of shares of its capital stock, is subject to the federal documentary stamp taxing statutes; and under regulation 113.82, the tax is based on the net consideration where it is definite in amount, or may be definitely determined. Where corporate stock is originally issued in consideration of the conveyance of certain real property to the corporation, it must be presumed that the par or fixed value of the stock was the amount of consideration for the conveyance. The Florida statutes, being similar to the federal act, takes the construction placed upon the federal act after which it was patterned (*Gay v. Inter-County Telephone and Telegraph Company, Fla.*, 60 So. 2d 22). The Florida documentary stamp taxes on conveyances of real property are based on the consideration for the realty and not its value (§201.02, F. S.; *Culbreath v. Reid, Fla.*, 65 So. 2d 556).

Where real property is conveyed to a corporation in exchange for the issuance of a stated number of shares of the capital stock of the corporation, the documentary stamp taxes due are measured by the par or fixed value of the stock issued therefor unless it is made to appear that there was other consideration for the stock in addition to the said conveyance.

057-13—January 17, 1957

EDUCATION

COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION; EFFECT OF 1956 CONSTITUTIONAL AMENDMENT TO ART. XII—SJR 703, 1955 (§2A, ART. XII)

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Will a county superintendent of public instruction be able to serve out his full term after he has been commissioned for four years regardless of whether or not the appointive method of selecting a superintendent is adopted by a county?

2. Is there a choice as to the method of deciding whether a county shall appoint or elect its superintendent? Can the legislature decide this question, or must it be decided by vote of the people of the county?

3. If the legislature is able to decide, and determines in favor of an elective superintendent, can the school board then call for a vote by the people to determine the same question? Would the legislature or the people have the final say in such a matter?

4. If the legislature is able to decide the question, and does decide in favor of an appointive superintendent, can it set the date for the change to an appointive superintendent at its own discretion? In other words, could it set the date authorizing the school board to appoint a superintendent after a four-year term is completed?

Senate joint resolution 703 of the 1955 legislature provides for an amendment to Art. XII, Fla. Const., which was subsequently ratified by the electors of the state at the general election in November, 1956.

The amendment provides:

(1) From and after Jan. 1, 1957, the county superintendent of public instruction shall be appointed by the county board of public instruction in the counties of Duval, Sarasota, Dade and Pinellas wherein the proposition is affirmed by a majority vote of the qualified electors of any such county, or by a special act of the legislature making the office of county superintendent of public instruction appointive.

(2) To submit the proposition contained in sub. §(1) above to the electors a special election shall be called by the county commissioners of such county upon the request of the county board of public instruction therein, which election shall be held within 60 days after request and the result thereof shall determine whether sub. §(1) shall be effective, in such county.

(3) Any county adopting the provisions of sub. §(1) hereof may after four years return to its former status and reject the provisions of this section by the same procedure outlined in sub. §(2) hereof for adopting the provisions thereof in the beginning, or by a special act of the legislature."

AS TO QUESTION 1:

On Dec. 14, 1956, attorney general's opinion 056-349 was issued

upon your request. Said opinion dealt with similar problems of implementation of SJR 638, 1955 legislature, relating to the abolition of school district trustees. In answering question 9 said opinion read: "If the special election results in implementation of the constitutional amendment abolishing the office of school district trustee, the office would terminate forthwith and the trustees would be relieved of their duties immediately, or as soon thereafter as it would be possible from a practical standpoint for them to turn over necessary records or equipment to the county board of public instruction." I believe that the same reasoning would apply with regard to the present question. In other words, a county school superintendent would not be able to serve out his full term if any of the counties affected by the constitutional amendment implemented the amendment and changed to an appointive system.

Since the amendment provides that the office of county school superintendent can be made appointive (in the counties affected) either by a special election of the electors in the county or by a special act of the legislature, I believe that the term of office of the incumbent school superintendent would terminate at once upon an affirmative vote of the electors at a special election as provided in the amendment, or upon the effective date of a special act of the legislature implementing the amendment.

The incumbent could of course be appointed by the school board to serve the remainder of the term if the board so desired.

AS TO QUESTION 2:

Section (1) of the amendment provides an alternative method which the counties affected may employ in implementing the amendment. Both alternatives are equally effective and the county does have a choice as to which method it shall employ, i.e. a vote of the electors in the county or through a special act of the legislature.

AS TO QUESTION 3:

If a county changes to an appointive system of employing school superintendents under this amendment, it may do so by either of two methods as stated above. Either method, i.e. special election or special act of the legislature, would be effective and would be binding on the county.

Section (3) of the amendment provides a method for returning to an elective system for employing school superintendents. The county may reject the appointive system and return to an elective system by either of the two methods originally employed in transferring to an appointive system, i.e. either by a special election or by a special act of the legislature. This rejection and return to an elective system cannot take place for a period of four years, however, from the date on which the county implemented the amendment and went under the appointive system.

Answering your 3rd question specifically, the school board could not immediately call for an election to determine the question if the legislature had already exercised its prerogative of providing for an appointive system by special act, provided, however, that after four years either the school board or legislature could act to return the county to an elective system as provided in §(3) of the amendment.

AS TO QUESTION 4:

If the amendment is implemented by a special act of the legislature, the effective date of the act could either be fixed in the act itself or it would take effect 60 days after the act was filed in the office of the secretary of state.

If the effective date of the special act was fixed at some future date, for example, four years later, or upon the expiration of the term of office of the incumbent superintendent as contemplated in your question, such legislation would govern when the act itself became effective. A postponement of the implementation of the constitutional amendment such as this, however, would not prevent the school board from calling a special election to determine the question in the interim as provided in §(2) of the amendment since the county would not have actually adopted the provisions of §(1) of the amendment unless there had been an election or a special act of the legislature which had become effective.

057-14—January 18, 1957

INSURANCE

LIABILITY OF MUNICIPALITY FOR PREMIUM TAX RECEIPTS IMPOSED BY §645.09, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Where a municipality purchases insurance coverage from a non-admitted insurer under the provisions of Ch. 645, F.S., is said municipality liable for the payment of the premium receipts tax of 2% on the gross premium for said insurance, as provided by §645.09, F.S.?

The attorney for the city of Coral Gables in his letter to the chief auditor of the insurance department, in relation to the above question, quotes from a letter of said chief auditor to the manager of an insurance agency in this state, as follows: "Only political subdivisions of the state are exempt from payment of this premium tax, and cities are not considered as political subdivisions." This attorney expresses surprise at the conclusion. Apparently there is a reasonable explanation for both the conclusion and the contrary view, as we shall explain.

In our former opinion 053-156 (1953-1954 Biennial Report, page 616), we dealt with the question of whether a county school board was liable for the tax here involved, and determined that such board was not liable. A copy of that opinion is attached, to which reference is made. At the time that opinion was prepared, our non-admitted carriers act was set forth in our statutes as §§627.55-627.70. Subsequent thereto, these sections were placed in Ch. 645, F. S., and re-numbered §§645.01-645.16, F. S. Hence, to avoid confusion it is noted that §§627.59, 627.63 and 627.65 mentioned in said opinion are now respectively §§645.05, 645.09 and 645.11, F. S. There were some 1955 amendments of §645.05, but features thereof dealt with in former opinion 053-156 remain unchanged.

Notice is taken of the following definition in sub. §1.01(10), F. S.: "In construing these statutes and each and every word, phrase, or part hereof, where the text will permit: . . . (1) The words 'public body,' 'body politic' or 'political subdivision' include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts and all other districts in this state." Hence, if there is or should be included in Florida Statutes a tax exemption statute applying to "political subdivisions," by virtue of this definition the provision would include municipalities if the text otherwise would permit. However, we are not here dealing with a statutory exemption and the words "political subdivision"; we are

dealing with a claimed exemption of a municipality and its relationship to the state. Technically a municipality is not a "subdivision of the state" (i.e., a "political subdivision" of the state) in relation to the sovereignty of the state, division of power in the exercise of that sovereignty, and such rights, privileges and immunities essential to and characteristic of sovereignty (*City of Tampa v. Easton*, Fla., 198 So. 753). A county board of public instruction has been termed an instrumentality of the county wherein such a board functions (*First National Bank v. Board of Public Instruction*, Fla., 111 So. 523). As such an instrumentality, the functions of a county school board are an integral part of the functions of the state in the broad sense of the exercise of state power by and through the state, its officers, agencies and political subdivisions. Thus, a county school board, as dealt with in opinion 053-156, is not identical in nature with a municipality. On this point of political subdivisions of the state, it is significant that §1, Art. VIII, Fla. Const., dealing with "Counties and Cities," provides "The state shall be divided into political divisions to be called counties," but makes no similar reference to municipalities dealt with in said article.

The conclusion in opinion 053-156 is quoted in part: "Whether or not a county school board could be required to pay an excise tax such as here found if the statute specifically included political subdivisions of the state (other than municipalities) in its coverage, is a question which we do not attempt to answer." It may be that the insurance department construed the quoted words in parentheses "other than municipalities" as excluding municipalities from the coverage of the words "political subdivisions." A reading of the opinion and of the quoted reference to municipalities will instantly disclose the intent and meaning of the reference.

As we have pointed out in opinion 053-156, in certain instances where the constitution or the legislature has had occasion to grant tax exemptions to the state or governmental units therein, cities and towns have been included, as evidenced by exemptions as to ad valorem taxes (§1, Art. IX, Fla. Const.; §192.06, F. S.); as to state sales taxes as originally provided (Ch. 26319, 1949; but see now specific inclusion of "any political subdivision, municipality, etc." in sub. §(1) of §212.02, F. S.); and as to license fees for motor vehicles. (§320.10, F. S.). A reading of opinion 053-156 will demonstrate that generally in relation to tax exemptions, municipalities are included with other public agencies. And as set forth in such opinion there is respectable authority that a statute imposing license fees should not be applied to "public agencies" unless the intention so to do is clearly expressed.

In view of the foregoing and the reasoning and conclusions set forth in former opinion 053-156, in my opinion the question is answered as follows:

This 2% tax imposed by §645.09, F. S., is payable by an insured who acquires a policy from a non-admitted carrier under the circumstances set forth in Ch. 645, F. S. Without doubt it is a consumer's tax and is not to be confused as to nature with the regular premium receipts taxes imposed by §205.43, F. S., upon authorized insurers. In relation to this question, a municipality reasonably appears to occupy the same position as the county school board dealt with in opinion 053-156, and hence is exempt from payment of the tax involved. The question, therefore, is answered in the negative.

057-15—January 17, 1957

TAXATION

LICENSE TAXES, OCCUPATIONAL—EXEMPTIONS, CRIPPLES, INVALIDS, AGED, ETC.—§205.15, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

May a person entitled to exemption from the payment of license taxes by §205.15, F. S., be issued licenses to engage in two or more businesses, occupations or professions without paying the license taxes for the additional licenses issued?

Licenses may, under §205.15, F. S., be issued without the payment of a license tax to "all confirmed cripples, deaf and dumb persons, or invalids physically incapable of manual labor, widows with minor dependents, and persons 65 years of age or older" upon the furnishing of proper proof to the tax collector of such disability, condition or age. Under a limitation in the said statute persons may be issued the exempt license only where they use their own capital, *not in excess of \$500*, and where the licensee carries on the business with *not more than one employee or helper*. This section does not provide license tax exemption for war veterans; such exemption being provided by §§205.16 and 205.161, F. S. We here deal only with said §205.15, F. S.

It is a well settled rule that "he who would shelter himself under an exemption clause must clearly show that he is entitled under the law to exemption, and the law is to be strictly construed as against the person claiming the exemption and in favor of the public." (Harper v. England, 124 Fla. 296, 168 So. 403, text 406; see also 53 C. J. S. 603, §31). Tax exemptions are favored upon the theory that the concession is due as *quid pro quo* for the performance of a service essentially public, by which the state is relieved *pro tanto* from the necessity of performing. Charitable and educational associations render services that would otherwise have to be performed through the use of public funds (84 C. J. S. 414, §215; 61 C. J. 382, note 98). Exemption from license taxes for cripples, deaf and dumb persons, invalids, widows and old persons partake of a like or similar purpose. The license obtained without payment enables the person to operate a small business and make him self-sustaining when otherwise he might have to be supported from public funds. We think that this is the intent and purpose of the Florida Statutes.

There may be instances where a person might by himself, or with only one employee, be self-supporting through the operation of two or more businesses when he would not be self-supporting through the operation of only one business. The attorney general in 1931 had before him an application for licenses to operate both a barber-shop and a beauty parlor by a disabled war veteran; although the application was rejected it was rejected upon the theory that the applicant owned only an undivided interest in each business and not the entire business, not on the application being for the operation of two businesses (1931-2 Biennial Report 707). Again in the same year it was indicated that a person within a prior similar statute doing a peddling business might be furnished licenses in two or more counties (1931-2 Biennial Report 896).

In the light of these statutes, authorities and observations we feel that the above question should be answered in the affirmative,

so long as the capital invested in the combined businesses, professions and occupations operated by the applicant will not exceed \$500 and he is assisted by not more than one assistant or employee.

057-16—January 18, 1957

COURTS

EXPERT WITNESSES—QUALIFICATIONS IN CIVIL AND CRIMINAL PROCEEDINGS—§§90.23, 90.231 and 932.30, F. S.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs' Ass'n, Tallahassee*

QUESTION:

Under what circumstances and conditions can a police officer, such as an experienced identification man, accident investigator, laboratory technician or analyst, regularly employed by a municipal police department or sheriff's office, qualify as an "expert witness" under the provisions of §§90.23 and 90.231, and §932.30, F. S., when called to testify in civil or criminal proceedings?

Sections 90.23 and 90.231, F. S., relate solely to expert witnesses in *civil* actions. The term "expert witness" therein found applies exclusively to a person duly and regularly engaged in the practice of his profession who holds a professional degree from a university or college and has had special professional training or experience, or one possessed of special knowledge or skill in respect of the subject upon which he is called to testify. It would be up to the trial court to determine whether or not the law enforcement personnel listed in your question have been shown to possess the requisite qualifications and special knowledge to warrant so testifying; and such decision is usually conclusive upon this point. Such has long been the law in Florida (*Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28).

Section 932.30, F. S., relates solely to expert witnesses in *felony* prosecutions, and it seems clear that the rule cited above as to civil proceedings also holds true in criminal proceedings to the effect that it is the province of the trial court to determine whether or not a witness offered as an expert has such qualifications and special knowledge as to make his opinions in answer to hypothetical questions admissible; and the decision of such trial judge is conclusive upon the question unless it appears from the transcript to have been erroneous or to have been founded upon some error in law (*Davis v. State*, 44 Fla. 32, 32 So. 822; *Tully v. State*, 69 Fla. 662, 68 So. 934).

These observations seem to answer your question, in that the trial judge would have to determine whether or not the officer or technician had special knowledge or skill in respect to the subject upon which he is called to testify.

057-17—January 21, 1957

CONVEYANCES

RIPARIAN RIGHTS IN WATERS OR SUBMERGED LANDS ON SIDE OF DEDICATED PUBLIC STREET OPPOSITE FROM LANDS OF DEDICATOR OF STREET OR HIS GRANTEEES.

To: *Van H. Ferguson, State Land Agent, Tallahassee*

QUESTION:

Where a person owns lands abutting on a street

dedicated to the public, do riparian rights in waters or submerged lands abutting the opposite side of such street accrue to the public, or are the riparian rights reserved to the owner of the fee in the street?

The intent of the dedicator is of vital importance when determining whether riparian rights, under the circumstances stated in the question, are in the dedicator or his grantees, or in the public. However, inasmuch as the intent of the dedicator must be determined in each instance from the language used in the dedication or other evidence indicating the dedicator's intent, it is impossible to apply any one rule to all situations.

The relevant facts in the case of *Brickell v. Town of Fort Lauderdale*, 75 Fla. 622, 78 So. 681, were: The town of Fort Lauderdale brought suit to enjoin the defendants from obstructing North and South River streets in the town of Fort Lauderdale by erecting buildings, providing wharves, docks, boatways, and other obstructions on such parts of those streets as were contiguous to and bordered by the waters of New river, a navigable stream which extends through part of the city. The defendants had, prior to the time the suit was instituted, laid out a townsite on lands owned by them, subdivided the lands into blocks or lots with streets and avenues, and caused the subdivision to be platted. The plat has been duly recorded. The relevant portion of the dedication reads as follows:

... and that we do hereby dedicate to the perpetual use of the public the streets or highways shown thereon, reserving to ourselves, our heirs, personal representatives, successors, or assigns, owning lands abutting or adjoining the same, the reversion or reversions thereof whenever discontinued by law.

The trial court held that the defendants were owners in fee simple of the lands platted as the town of Fort Lauderdale, and that they dedicated to the perpetual use of the public the streets and highways shown thereon, and that they confirmed such dedicating by making deeds of conveyance to land described therein by reference to such plat, and that by virtue of such dedication there was vested in the public an easement into and over the streets and highways, that North and South River streets border on the waters of New river, that the fee in the land over which North and South River streets were laid out and dedicated was vested in Mary Brickell or her heirs, personal representative, successors, or assigns, subject to the said easement, and that the owners of the fee and the public had a coexistent right, the owner to use the land and the public to use the street and that one right did not destroy the other.

The defendants took appeal and the plaintiff filed cross-assignments of error to the effect that the final decree was ambiguous and did not clearly and specifically find and decide whether the riparian rights pertaining to the banks of New river at the points in question were an incident of or appurtenant to the public easement, or whether they were an incident of or appurtenant to the legal title or fee of the defendants. The supreme court stated that the vital questions presented by the assignments of appellant and cross-assignments of appellee "are whether North and South River streets have a river boundary, and, if so, do the riparian rights in such streets accrue to the public, or are they reserved to the owner of the fee in the streets?"

The supreme court of Florida specifically held that North and

South River streets extended to the navigable waters of New river. However, when the supreme court came to the 2nd question, it answered the question as follows:

Where a dedication to the public use is made of a street or roadway, and the same is used by the public, it is the duty of the city, as trustee of the public rights in and to the streets within whose corporate limits they are, to maintain the public uses against encroachments, and this applies to territory taken into the corporate limits after the dedication as well as to territory included in the corporate limits at the time of the dedication.

A careful analysis of the case, however, indicates that the supreme court actually intended to hold that the riparian rights incident to the streets involved were in the public and not in the dedicator. This conclusion is reinforced by the citation of the case by the supreme court in a subsequent case in which substantially the same question was involved.

In *City of Tarpon Springs, et al v. Smith*, 81 Fla. 479, 88 So. 613, the supreme court of Florida held that:

Where a dedication plat shows that a street line at some points extends to and along the water line of a navigable body of water, and at other points the street lines depart from the water line and after encompassing considerable space again return to the water line, there may be riparian rights incident to the street easement at the points where the line of the street and the navigable water line coincide or join; but there may be, under appropriate circumstances, no riparian rights incident to the street where the street and water lines do not intersect, when it appears that the space delineated between the water line and the street line was not dedicated."

The supreme court cited the case of *Brickell v. Town of Fort Lauderdale*, supra, and said:

The dedication by the owner under the particular town plat, showing streets, etc., manifestly did not give any easement or other rights beyond the expressly designated limits of the streets and the incidents that are appropriate thereto. Wherever the street, Anclote boulevard, as delineated by line and stated width, touches or approximately touches the body of the Anclote river, the riparian rights that are appropriate to a street easement were also impliedly dedicated as an incident; there being no express or implied reservation by the dedicator of such riparian rights.

The instant question was discussed by the supreme court of Florida in the case of *Marshall v. Hartman*, 104 Fla. 143 139 So. 441. However, it was unnecessary for the court to specifically decide the question and the discussion by the court, therefore, was mere dicta. The court stated that the rule that grantee of roads abutting on a street whose grantor owned title to land under the street, is presumed to own soil to the center of the street subject to the easement, did not vest grantee with riparian rights in waters or submerged land abutting the opposite side of the street. The court, in a syllabus prepared by it said:

The grantee of lots abutting on a public street, whose grantor owned the title to the land under the street and

who makes the conveyance with reference to the plat showing the street, is presumed, in the absence of limitations in the deed, or other evidence to the contrary, to own the soil to the center of the street, subject to the public easement; but this rule would not vest the grantee with riparian rights in waters or submerged lands abutting the opposite side of such street.

The supreme court indicated in the case of *Marshall v. Hartman*, supra, that the *original owner*, who made the plat and who owned the fee to the high-water mark might, under some very respectable authorities, be held to be thus vested with riparian rights, in spite of his dedication of a street along the waterfront of his property.

A casual reading of the case of *Caples v. Taliaferro, et al*, 144 Fla. 1, 197 So. 861, may indicate that that case may have some bearing on the question. A careful analysis of the case, including an analysis of the dissent, will show that it is not relevant to the instant question. In the dissent, it is pointed out that the plat by which the public walk had been dedicated had been vacated and the property returned to its original status of acreage in its wild unimproved state. Therefore, the facts in that case were such that the question under consideration could not exist.

An analysis of the decisions of the supreme court of Florida indicates that that court has adopted the rule that, in the absence of a limitation in the deed of conveyance by the dedicator, or other evidence to the contrary, the grantee (abutting owner) owns the soil to the center of the street subject to the public easement and that such ownership does not vest the abutting owner with riparian rights in waters or submerged lands abutting the opposite side of the street which separates the person's land from the waters.

057-18—January 22, 1957

TAXATION

PARKS DEDICATED TO USE OF SUBDIVISION LOT OWNERS—EXEMPTION FROM TAXATION—USE PUBLIC OR PRIVATE—§1, ART. IX AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where a subdivider of lands into building lots designates certain area or areas of the platted lands as a park or parks, and dedicates such area or areas as a park or parks "for the use of property owners of said plat," are such dedicated lands entitled to tax exemption?

The plat and dedication from which the above question arises was made and executed on May 3, 1935, and approved and accepted by the board of county commissioners, of the county wherein the platted lands lie, on June 3, 1935. The said plat and the dedication thereon "dedicated for public use and public ways, to be used as such, all parcels and parts of land indicated on said plat as streets, also dedicates the parcel and part of said land lying between the Gulf Coast Highway and the Gulf of Mexico as '_____ Park' for use of property owners of said plat" (emphasis supplied). It is noted that the plat and the dedication thereon dedicates the streets

for public use; but dedicates the park only for the use of the owners of lots in the subdivision and not to the public. The plat does not dedicate the park to the use of the public; but only to the use of certain lot owners. Here we have a private and not a public park. Title appears to be in the dedicator in trust for the use and benefit of the owners of the lots in the subdivision (see *McCorquodale v. Keyton*, Fla., 63 So. 2d 906).

Under §1, Art. IX, and §16, Art. XVI, State Const., all property in the state is subject to ad valorem taxation except such as may be held and used for religious, scientific, municipal, educational, literary or charitable purposes. These sections of the constitution are limitations upon the power of the legislature (*State v. St. John*, 143 Fla. 544, 876, 197 So. 131, 549; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303). Although public parks have been held tax exempt, they being used by the public for a municipal purpose (84 C. J. S. 390, §203, Note 96; 61 C. J. 370, Note 25; 51 Am. Jur. 554, §563, Note 14), this rule does not extend to private parks.

Where, in connection with the establishment of a subdivision, an area is set apart and dedicated to the use of the owners of lots in such subdivision, such dedication would not seem to contemplate such a use as is intended by §1, Art. IX, and §16, Art. XVI, State Const., and would be subject to taxation, unless, notwithstanding such specific dedication, it is actually held and used for public park purposes, that is, for the benefit of the general public as distinguished from merely the owners of lots in the subdivision.

The question of how held and used would be largely a question of fact to be determined by the taxing authorities.

057-19—January 23, 1957

FOODS, DRUGS AND COSMETICS

FLAVORED SIPPING STRAWS—SALE OF SACCHARIN AND FOOD CONTAINING ARTIFICIAL SWEETENER, PROHIBITED; CONSTRUCTION OF §§500.25, 500.26*, F. S.

To: *Nathan Mayo, Commissioner of Agriculture, Tallahassee*

QUESTION:

Under the provisions of §§500.25 and 500.26, F. S., Florida food, drug and cosmetic act, may a device consisting of a sipping straw, containing a core of heavy paper, impregnated with saccharin in solid form, designed to provide a "new way to drink milk," and recommended for use by young children to make milk more palatable, lawfully be sold as an artificial sweetener, in whole or in part, by any person other than by duly registered and licensed pharmacists upon the written prescription of licensed practicing physicians, with the date, and the name of the physician, and the name of the person for whom prescribed to be kept on file by the pharmacist?

The answer to the question presented requires consideration of the legislative enactment. Section 500.25(1) had its origin in Ch. 9363, 1923, which read as follows:

(1) The sale of saccharin, a drug, or other artificial sweetener for use as a substitute for sugar; or the manufacture or sale of foods or drinks of any kind containing saccharin or other artificial sweetener as a

*§§500.25(1) and 500.26 repealed by Ch. 57-1.

substitute for sugar in part or in whole, is prohibited in the state; provided, that the saccharin, or foods containing saccharin, shall be sold or dispensed only by duly licensed pharmacists upon the written prescription of duly licensed practicing physicians, with the date and the name of physicians and of the person for whom prescribed, and kept on file by the pharmacist.

The foregoing is the exact and precise words and language now appearing in §500.25(1), F. S., now in effect.

It cannot be questioned that the core of the sipping straw described in the question presented is "saccharin," the sale and distribution of which is prohibited by the statute.

The statute of 1923 cited above was amended by the legislature of 1953 by the addition thereto of an additional subsection numbered "(2)" permitting the sale and distribution of foods or drinks containing any artificial sweetener as a substitute for sugar, under certain restrictions and conditions. The amendment has no relation to the question presented, inasmuch as its application is confined to food or drinks in the preparation of which artificial sweetener has been added, while the device under consideration here is a container impregnated with saccharin which does not become added to the food or drink until the device is used in the process of consumption of the food or drink.

Under the provisions of statute law, which has been in effect for the period of 33 years, the sale or distribution of saccharin is prohibited, except by a registered pharmacist in the manner and under the conditions prescribed by §500.25(1), F. S.

The sanctions imposed for violation of the statute are those recited in §500.26(1), F. S., with which you are doubtless familiar.

The question is accordingly answered negatively.

057-20—January 24, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
STATE AND COUNTY RETIREMENT SYSTEM; DESIGNATION
OF BENEFICIARY; DIVORCE—§§122.12 AND 122.15, F. S.**

To: Ray E. Green, Comptroller, Tallahassee

QUESTIONS:

1. Where an officer or employee of the state and county officers and employees retirement system (Ch. 122, F. S.), pursuant to §122.12, F. S., designates his wife as beneficiary but is later divorced from that wife and later remarries, is such designation of beneficiary binding on the said officer or employee after such divorce?

2. Where the divorced beneficiary dies before the said officer or employee does the right to the deposit pass to the heirs, devisees or personal representative of such beneficiary?

Said §122.12, F. S., provides in part that "any officer or employee may file, in writing, a designation of beneficiary and it shall be the duty of the comptroller to refund 100%, with interest, of the contributions made to the retirement fund by such deceased officer or employee to such designated beneficiary." After making the designation of beneficiary as aforesaid "the officer or employee shall have the privilege of changing, in writing, the designated beneficiary

at any time." Where no beneficiary is designated a refund of the contributions will be made to the persons and in the order mentioned in §222.15, F. S. (See §122.12, F. S.)

The beneficiary under said §122.12, F. S., bears a close resemblance to beneficiaries in life insurance policies, where the right of the beneficiary is that conferred by the policy or contract of insurance (46 C. J. S. 59, §1172). "Where under the terms of a life insurance policy there is reserved in the insured the right, without the consent of the beneficiary, to change the beneficiary first named in the policy upon the sole condition that the assent of the insurer be acquired, the beneficiary named in the policy acquired no vested right or interest during the life of the insured, but only acquired an expectancy" (Pendas v. Equitable Life Assurance Society, 129 Fla. 253, 176 So. 104, text 110 and cases cited). *Generally where a policy holder names his wife as beneficiary the person holding that relation to the insured at the time of the issuance of the policy and not the one who may become his wife by subsequent marriage, after divorce, is deemed the beneficiary* (46 C. J. S. 45, §1160). Where the beneficiary dies before the maturity of the policy, but has a mere expectancy and not a vested right, his estate or legal representatives take nothing under the policy at maturity, although a beneficiary with a vested interest would have such an interest as would pass to his estate or legal representative (46 C. J. S. 54, §1170; 29 Am. Jur. 973, §1304); however, it is noted there are some decisions contrary to the weight of authority as cited in the above law texts. My advice would be that you might wish by appropriate proceedings, interpleader or declaratory judgment to have the matter judicially determined should an actual situation of this nature arise.

Applying the above rules relative to life insurance policies to §122.12, F. S., the above stated questions are answered as follows:

1. Where, under §122.12, F. S., a member of the state and county officers and employees retirement system names his or her then spouse as beneficiary, such designation is effective, unless changed by the officer or employee, notwithstanding divorce, unless the such beneficiary predeceases such officer or employee.

2. Where the beneficiary dies prior to the said officer or employee the right of such beneficiary, not being vested but a mere expectancy, ceases upon his or her death, and the right to the deposit, unless there be a further designation, passes under said §§122.12 and 222.15, F. S., to the person or persons named therein.

057-21—January 21, 1957

TAXATION

DOCUMENTARY STAMP TAXES—PROMISSORY NOTES MADE BY FEDERAL CREDIT UNIONS— CH. 201, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Are promissory notes made and executed by federal credit unions in this state subject to documentary stamp taxes under Ch. 201, F. S.?

Documentary stamp taxes are imposed, by §201.08, F. S., upon promissory notes made, executed and delivered in this state. We find nothing in Ch. 201, F. S., expressly exempting promissory notes and

other instruments made, executed and delivered in this state by federal credit unions doing business in this state. There being no express exemption of federal credit unions in the state statutes and laws we must look to the federal statutes and laws to determine the question.

As a general rule "a state and the subordinate taxing units thereof are without power to submit to taxation the property of the federal government, or the means, instrumentalities, and agencies thereof which it employs to carry out its proper functions, unless congress expressly confers a right upon the state to tax such agencies, instrumentalities or property" (51 Am. Jur. 279, §218). When the statutes and laws relating to federal credit unions are read as a whole such credit unions appear to be federal instrumentalities, and in this connection special reference is made to their duties under §1767, title 12, of the U. S. code.

Although the real and personal property of credit unions is made subject to state and local taxation "to the same extent as other similar property is taxed," their other property "franchises, capital, reserves, surplus and other funds and their income shall be exempt from all taxation . . ." (§1768, title 12, U. S. code). The congress, therefore, appears to have authorized the state taxation of certain property, has expressly prohibited the taxation of others, and has made no mention of the taxation of others. Such promissory notes seem to be excluded from the federal documentary stamp taxing laws by both the laws and regulations.

We are, therefore, of the opinion that the above question should be answered in the negative; and any taxes heretofore paid upon such instruments would appear to be a payment when no tax was due.

057-22—January 24, 1957

EDUCATION

SCHOOL BOND ELECTIONS—COST OF SPECIAL REGISTRATION OF FREEHOLDERS—\$98.081 AS AMENDED BY CH. 31404, 1956

To: Bryan Willis, Auditor, Tallahassee

QUESTION:

Is the county board of public instruction required to pay the costs of making a special registration of freeholders for the purpose of holding a school bond election?

I assume that the special registration contemplated will be made under authority of Ch. 31404, 1956.

Said chapter provides, in part:

(b) The county commissioners of any county shall, when presented with a resolution adopted by the board of public instruction of said county requesting a reregistration of the freeholder electors, call such reregistration for the purpose of securing a new and up-to-date list of freeholder electors of said county to participate in any election called for the purpose of approving the issuance of bonds for financing the school building program of said county or for the purpose of approving any act with reference thereto. The cost of making the call and conducting the reregistration provided by this subsection shall be borne by the county board of public instruction requesting the same.

Since this act requires the county board of public instruction to bear the cost of the special registration contemplated, your question is answered in the affirmative.

057-24—January 25, 1957

PUBLIC LANDS AND PROPERTY

INTERNAL IMPROVEMENT FUND—POWER OF TRUSTEES TO MAKE LOANS TO POLITICAL SUBDIVISIONS FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS—§§253.01, 253.02, 253.64, 270.23 AND 1.01(10), F. S.

To: F. C. Elliot, Internal Improvement Fund, Tallahassee
QUESTION:

May the trustees of the internal improvement fund of the state lend internal improvement funds to political subdivisions of this state for the construction of public improvements?

The preamble to Ch. 610, 1855 (Ch. 610 is brought forward as §§253.01 and 253.02, F. S.), provides, among other things, the following:

Whereas, The Constitution of this State declares "that a liberal system of Internal Improvements, being essential to the development of the resources of the country, shall be encouraged by the Government of this State, ..." (Emphasis supplied.)

The preamble to said Ch. 610 clearly contemplates that the trustees of the internal improvement fund shall *aid and encourage internal improvements in this state*. Furthermore, broad discretionary powers are given the trustees by §253.02, F. S. It is provided in said §253.02, that the trustees "... have all the *rights, powers, property, claims, remedies, actions, suits and things whatsoever belonging to them, or appertaining before and at the time of the enactment hereof, and they shall remain subject to and pay, fulfill, perform and discharge all debts, duties and obligations of their trust, existing at the time of the enactment hereof, or provided in this chapter.*" (Emphasis supplied.)

Section 270.23, F. S., provides:

After payments have been made to the state school fund, as provided by the constitution and by law, any balance shall be and remain a part of the internal improvement fund to be applied by the trustees of said fund to the payment of the expenses *and the administration of said fund*, including the lands thereof, and to such other purposes as prescribed by law. (Emphasis supplied.)

It is my opinion that the broad authority vested in the trustees authorizes them to, either by direct grant, or loans to *political subdivisions of this state, aid and encourage directly, or indirectly, the construction of internal improvements*, i. e., airports, breakwaters, reclamation of lands, drainage, etc. This has been the established policy of the trustees for many years. This is evidenced by an excerpt from a resolution appearing on pp. 268 and 269 of the minutes of the trustees for the year 1945:

WHEREAS, the Trustees of the Internal Improvement Fund for the past 90 years have undertaken and car-

ried out works of internal improvements in this state, among which are state buildings as coming within the category of *internal improvements*. . . . (Emphasis supplied.)

The supreme court of Florida has held on many occasions that the departmental construction placed upon a statute by an administrative department of state government, though not binding upon the courts, yet, when not in conflict with the constitution or plain intent of the act, such departmental construction is of great persuasive force and efficacy, *especially when established by long usage*. (State ex rel Fronton Exhibition Company v. Joseph R. Stein, et al, 144 Fla. 387, 198 So. 82.)

The words "public body," "body politic" or "*political subdivision*" include counties, *cities, towns, villages*, special tax school districts, special road and bridge districts, bridge districts and all other districts in this state (§1.01(10), F. S.). Section 253.64 expressly authorizes the trustees to invest internal improvement funds in bonds and securities of governmental agencies of the state.

In the light of the history of statutes relating to the trustees of the internal improvement fund, including their creation, their duties and responsibilities, the purposes for which the fund was established, and the interpretation which the trustees have throughout the years placed upon such statutes, it is my opinion that the trustees of the internal improvement fund do have authority to *grant loans or make direct grants of lands, or funds derived from the sale of such lands, to political subdivisions of this state* as defined in §1.01(10), F. S., for use by such political subdivisions in the construction of public improvements. The trustees could, and do, make direct grants to various political subdivisions of this state of lands owned by them to be used by such political subdivisions for public purposes. The right to grant the land directly certainly carries with it the right and authority to make grants or loans of funds derived from the sale of such lands.

Your question, therefore, is answered in the affirmative.

057-25—January 25, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
ELIGIBILITY OF LEGISLATOR TO BE COUNTY PROSECUTOR
—§125.03, F. S.; §§7 AND 27, ART. III, §15, ART. XVI,
STATE CONST.**

To: Cecil G. Costin, Jr., Representative, Port St. Joe

QUESTION:

Will acceptance of employment by the board of county commissioners of Gulf county as county prosecutor render one ineligible to serve as a member of the Florida house of representatives?

Regardless of any position this office might take concerning the above question, it is to be recalled that the house of representatives is judge of the qualifications of its members. Hence it is to be understood that this opinion deals solely with the question of whether the position of county prosecutor under §125.03, F. S., is a public office or appointment within the meaning of §7, Art. III, and §15, Art. XVI., State Const.

It is assumed that Gulf county is authorized to employ a

county prosecutor under §125.03, F. S., and that it is employment under this statute to which you refer in your question. Section 125.03 reads as follows:

The board of county commissioners of the several and respective counties of the state, wherein there shall be no county court or criminal court of record or court of record for the trial of criminal causes shall employ an attorney at law to prosecute all persons, charged with the commission of any kind of offense against the laws of the state in or before the county judge's court. . . .

Section 7, Art. III, Fla. Const., provides as follows:

No person holding a lucrative office or appointment under the United States or this State, shall be eligible to a seat in the Legislature of this State.

Notice is taken of the words "office" and "appointment" in this constitutional provision. In some jurisdictions under particular statutes wherein the word "appointment" has been used it has been held that, in the light of the context, such included an "employment." However, in the common acceptation, the meanings of the words "appointment" and "employment" are entirely different. One of the definitions of "appointment" set forth in Webster's New Intercollegiate dictionary is, "Designation of a person to hold an office or discharge a trust; as, appointment of trustees." Among the definitions of the term set forth in Twentieth-Century dictionary are the following: "Designation to office" and "the office to which one may be appointed"; and in the rather lengthy definition of the term in this dictionary there is no mention of the word being used in connection with "employment." In line with these definitions see *U. S. v. Schlierholz*, 137 F. 616. For contrasting purposes see definition of "employee" in the above Twentieth-Century dictionary; and also *In re Cortland Mfg. Co.*, 45 N.Y.S. 630; *Palmer v. Van Santvoord* (N.Y.) 47 N. E. 915. Reasonably it would appear that this word "appointment" set forth in above §7, Art. III, is to be construed as referring to public office and not to employment; and this statement is made even though the word "appointive" was used by our court in relation to employment of a prosecutor under §125.03, in *Moore v. State ex rel McDonald*, Fla. 41 So. 2d 310.

Section 15, Art. XVI, Fla. Const., provides in part as follows:
. . . no person shall hold, or perform the functions of, more than one office under the government of this State at the same time; . . .

In an advisory opinion to the governor, 76 Fla. 417, 79 So. 874, the supreme court advised former governor Sidney Catts that by virtue of the above-quoted constitutional provisions, where a state senator was appointed and commissioned as a county solicitor or prosecuting attorney his office of state senator would be vacated.

I do not consider that this advisory opinion is applicable to your question as it clearly has reference to the acceptance of another office, as distinguished from an employment, such as is contemplated by §125.03, F. S. According to §27, Art. III, Fla. Const., when an office is created, the incumbent of the office must be elected by the people or appointed by the governor (see *Blitch v. Buchanan*, 100 Fla. 1202, 131 So. 151). Although it is not specifically expressed in the above-cited advisory opinion, the inference is clear that the positions of county solicitor and prosecuting attorney referred to therein were elective or appointive offices, rather than employ-

ments. Otherwise, Governor Catts' request for the advisory opinion would have been denied, since his right to receive it had to be predicated upon some executive power or duty which in this case was undoubtedly his power to appoint someone to fill the office in question.

The legislature cannot be assumed to have intended to create an office by §125.03, F. S. The necessary assumption is that if the legislature had intended to create an office it would have provided for the incumbent to have been elected by the people or appointed by the governor, as required by the constitution, rather than merely employed by the county commissioners. Hence, in my opinion, §7, Art. III, and §15, Art. XVI, cannot be construed as being applicable to the employment contemplated by §125.03, F. S.

057-27—January 30, 1957

HIGHWAYS AND BRIDGES

HIGHWAY CODE FUNDS ADVANCED FOR ENGINEERING SERVICES BY STATE ROAD DEPARTMENT TO FLORIDA TURNPIKE AUTHORITY—§§340.03, 340.04 AND 340.27, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Is the comptroller authorized to honor vouchers for advances by the state road department to Florida state turnpike authority, pending sale of the authority's bonds, for the purpose of paying the latter's section engineers for right-of-way maps and preliminary construction plans, in connection with project 2 of the turnpike system authorized by Ch. 340, F. S., in view of §10 of the authority's agreement with such section engineers?

Chapter 340, F. S., is the "Florida turnpike law." It derived from Ch. 28128, 1953, as amended by Ch. 29634, 1955. The law is a comprehensive one, creating Florida state turnpike authority and prescribing its powers and functions. It is sufficient here to state that prior to its amendment in 1955, §340.03, F. S., authorized and empowered the authority to construct a turnpike project extending northerly from a point in Dade county a distance not exceeding 110 miles; and that the section as amended in 1955, authorized and empowered the authority to construct an additional turnpike project beginning at a point in St. Lucie county to a point in Duval county along a generally northerly route as described, referred to herein as project 2. Other projects authorized by said amended §340.03 are not here relevant.

Provisions are found in §§340.04(3) (b) and 340.27, F. S., for expenditures by the state road department, upon request of the authority, for engineering services, as described therein, the department to be reimbursed for such expenditures from proceeds of the bonds sold by the authority. The requested "right-of-way maps and preliminary construction plans" set forth in the above question, appear to fall within the purview of §§340.04(3) (b) and 340.27. In the case of *State v. Florida State Turnpike Authority, Fla.*, 80 So. 2d 337, (validation proceedings involving bonds for first project) the court stated with respect to such advances:

We reach question number 9. Sections 4(3) (b) and 27 relate to the advancement by the state road department of

funds for preliminary expenses in getting the construction of the turnpike underway and for the reimbursement of the department from the proceeds of the bonds. Again we construe the act in its entirety, Florida State Turnpike Authority v. MacVicar, Fla., 67 So. 2d 210, and decide that the procedure prescribed is legal. We are not dissuaded from the view by appellant's apprehension about the situation that would arise in the event the bonds could not be sold. We think the legislature legally provided for preliminary expenditures and that it is not necessary to wait until the bonds are sold and the money is in hand before taking any steps to launch the project.

In pursuance of its power and authority to construct project 2, the authority on Feb. 1, 1956, entered into an agreement for section engineer services with Beiswenger, Hoch & Associates, Inc. Section 10 of that agreement is quoted:

SOURCE OF FEE PAYMENTS—The authority anticipates that it will finance construction of the project by issue and sale of revenue bonds. To date, the authority has not issued any such revenue bond. It is expressly understood that all payments for section engineer services performed under this agreement shall be made solely from the proceeds of revenue bonds when sold by the authority to finance construction of Sunshine State Parkway, Project No. 2, Fort Pierce to Jacksonville, *or from other funds, if any, which may be or which may have been legally made available to the authority for such purpose*, and the authority shall be under no liability under this agreement to make payments to the section engineer from any other source. The payment of said fees is contingent upon the availability of funds derived from the proceeds of said revenue bonds, *or from such other funds as are mentioned in the preceding sentence*, and the liability of the authority is limited thereto.

In further pursuance of its power and authority to construct project 2, the authority for some time has been prepared to sell bonds of the authority to finance said project. However, by reason of market conditions, the authority has been delayed and continues to be delayed in the sale of such bonds.

The resident attorney of the state road department has furnished this office with a copy of a resolution of the authority, dated Dec. 19, 1956, the effect of which resolution is as follows: Request by the authority that the department make available monies in an amount not to exceed \$500,000 for the purpose of paying the section engineers "for right-of-way maps and preliminary construction plans as are prepared prior to the sale of the bonds." It is stated in the request for opinion that it is understood that the authority and department feel that it will be very advantageous to the state to do certain preliminary work with respect to surveys and obtaining right-of-way maps during the time that the authority is waiting for an improvement in the bond market. Attention is directed to the provisions of §340.27, F. S., particularly the expressed authority of the department, upon request of the authority, to expend monies, for the purposes set forth, "as may be necessary and desirable in the judgment of the department, to enable and accelerate the begin-

ning of the construction of the project authorized by §340.03." Section 340.03, F. S., has been amended, as aforesaid, and the provisions of §340.27, F. S., apply now to the section as amended.

The italicized words in the above-quoted §10 of the mentioned agreement reasonably include funds which may be advanced by the department in pursuance of §340.27, F. S. So construed, the other provisions of this section of the agreement present no obstacle to the department and the authority functioning under the provisions of §340.27, F. S.

In view of the foregoing, in my opinion the question is answered as follows:

The state road department's advancement of monies to the authority for the payment of services contemplated by §340.27 lies in the sound discretion of the department. It is apparent from the file that the department has determined that the "right-of-way maps and preliminary construction plans" set forth in the authority's request, fall within the meaning and intent of §340.27, F. S. The department having made that determination, the comptroller is authorized to honor vouchers of the department for advances to the authority for the purposes stated, up to the limit of the authority's request, during the period prior to the sale of the authority's bonds.

057-28—January 31, 1957

CRIMINAL PROCEDURE

ISSUANCE OF ARREST WARRANTS—AFFIDAVITS OF COMPLAINING WITNESS—ADMINISTRATION OF OATH BY PROSECUTING ATTORNEY—§901.02, F. S.

To: Harry P. Johnson, Tavares

QUESTION:

Does §901.02, F. S., authorize a prosecuting attorney in the county judge's court, who is also a notary public, to administer the oath or oaths to the complaining witness or witnesses making an affidavit or affidavits as the basis for the issuance of an arrest warrant by said court?

Section 901.02, F. S., reads as follows:

901.02 When warrant of arrest is to be issued. — A warrant may be issued, for the arrest of the person complained against if the magistrate, from the examination of the complainant and the other witnesses, if any, has reasonable ground to believe that any offense was committed within his jurisdiction and that the person against whom the complaint was made committed it; provided, however, that a warrant may be issued by said magistrate for the arrest of the person complained against, upon presentation to him of affidavits sworn to by the complaining witness or witnesses before the prosecuting attorney, provided such prosecuting attorney is authorized to administer oaths as a notary public or otherwise. (Emphasis supplied.)

Since the county judge is a magistrate (see §901.01, F. S.), I am of the opinion that the above quoted proviso to §901.02, F. S., requires that your said question be answered in the affirmative.

057-29—January 31, 1957

TAXATION

TAX ON CIGARETTES—EXEMPTIONS—MILITARY RESERVE TRAINING UNITS—§210.04(4), (5), F. S.

To: J. D. Williamson, Beverage Director, Tallahassee

QUESTION:

Does the exemption granted by §210.04(4), F. S., relating to cigarette tax, apply to military reserve training units existing in the state?

Subsections (4) (a), (b) and (5) of §210.04, F. S., provide as follows:

(4) (a) No tax shall be required to be paid upon cigarettes sold at post exchanges, ship service stores, ship stores or slop chests, to members of the armed services of the U. S., when such post exchanges or ship service stores are operated under regulations of the army or navy of the U. S. on military or naval reservations in this state, or on ships of the navy or merchant marine of the U. S.;

(b) Or upon the sale or gift of cigarettes by charitable organizations to bona fide patients in regularly established government veterans' hospitals in Florida for the personal use or consumption of such patients.

(5) It shall be presumed that all cigarettes are subject to the tax imposed by this chapter until the contrary is established, and the burden of proof that they are not taxable shall be upon the person having possession of them.

In determining whether or not a military reserve unit comes within the exemption of sub §(4) (a), supra, the entire language of the subsection must be read, and when that is done it is apparent that the exemption from state taxation on cigarettes sold to members of the armed forces at post exchanges, ship service stores, ship stores or slop chests, applies only (1) *when* such post exchanges, ship service stores, etc., are operated under regulations of the army or navy of the U. S., and (2) *on* military or naval reservations in this state.

The several military institutions, such as armories used by the national guard and national guard buildings used by the several reserve units, are not military reservations within the language of this statute, and therefore the military reservists are not entitled to such tax-free cigarettes at such establishments.

It is of course readily understood that when these reservists are under active military orders for training duty during the year and are stationed (usually for two-week periods) at some military or naval reservation, they are entitled to purchase cigarettes tax-free from the post exchange or ship service store on the reservation.

057-30—February 1, 1957

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—REFUND OF RETIREMENT CONTRIBUTION TO MEMBER OF FORMER STATE AND COUNTY SYSTEMS—§122.01, F. S. AND §§134.08 AND 134.18 OF FORMER CH. 134, F. S., PROVIDING FOR RETIREMENT OF COUNTY EMPLOYEES

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Where a person was a member of both the county and the state officers and employees retirement systems on the effective date of Ch. 29801, 1955 (July 1, 1955) consolidating such systems, but has since ceased to be a county employee, may such person elect to withdraw and receive his contributions made under the said county officers and employees retirement system?

We are advised, through an interoffice memorandum of your office exhibited to us, that "prior to the enactment of Ch. 122, F. S., such a refund could have been made." It also appears from the file before us that the person directly involved in the above question did not become either a state or a county officer or employee until after the effective date of the 1947 amendments making membership in the said retirement systems mandatory as to persons becoming officers or employees after the effective dates of said amendments. Had there been no merger of the retirement systems (Ch. 29801, 1955) into a single system (see Ch. 122, F. S.) and no election under §134.18, F. S., transferring service credits from either the county or the state system to the other, we feel that the said county employee could have, under §134.08, F. S., upon separation from service with less than 10 years of service credits, withdrawn his contributions to the said county system. We are not advised of any election to transfer service credits under said §134.18, F. S.

Section 1, Ch. 29801, 1955, consolidated Chs. 121 and 134, F. S., into a single state and county officers and employees retirement system, effective on July 1, 1955, thereby consolidating the service credits of all persons under either or both said Chs. 121 and 134 into one system, that is, Ch. 122, F. S. The provisions of said Chs. 121 and 134 have been merged into Ch. 122, F. S., and are no longer in force except to the extent saved by provisions in said Ch. 122 and constitutional provisions and requirements. There is now only one retirement system, not two. Had Ch. 122, F. S., been in force during the times of service of a single person in both capacities as a state officer and a county employee, no such refund as contemplated by the above question could have been made.

This seems to bring us to the application of §25 of said Ch. 29801 (§122.01(3), F. S.), which provides that the "rights of members of the retirement systems established by former Chs. 121 and 134, F. S., shall not be impaired, nor shall their benefits be reduced by virtue of any part of this chapter." One of the rights of a county officer or employee, as a member of the retirement system established under former Ch. 134, F. S., *who had not elected* under §134.18, F. S., to merge his credits with those under the state officers and employees retirement system, was to have a refund of his contributions, under §134.08, F. S., where he separated from

county service with less than 10 years credit in that retirement system. Had the county employee, although also a state officer or employee, and a compulsory member of both systems, severed his employment with the county prior to July 1, 1955, he could have elected under §134.08 to withdraw his contributions under that system, provided no election under §134.18 had been made.

Feeling that §25, Ch. 29801, 1955 (§122.01 (3), F. S.) fixed this right in the persons coming within its purview, unless and until waived by them, the above question is answered in the affirmative. Before such a person is permitted to withdraw such contributions he should be required to make written application therefor stating that no waiver has been made of the rights accorded him by said §122.01 (3) and waiving all rights to retirement based upon his said county employment.

057-31—February 5, 1957

TAXATION

AD VALOREM TAXES—EXEMPTIONS, NON-PROFIT CORPORATIONS—FLORIDA STATE UNIVERSITY HOUSING AUTHORITY ASSOCIATION, INC.—§192.06, F. S., §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

What is the right of the Florida State University Housing Ass'n, Inc., a non-profit corporation organized and existing under Ch. 617, F. S., to exemption from ad valorem taxation in this state?

Tax exemption for corporations of this nature are based upon statutes and laws enacted pursuant to §1, Art. IX, State Const., which permits "exempting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." Section 192.06, F. S., provides certain exemptions under this constitutional provision. This constitutional provision is not self-executing and requires legislation before the exemptions allowed may be effective. Section 16, Art. XVI, State Const., provides for tax exemptions for property of corporations in this state which is "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes."

Under the above statute and constitutional provisions *ownership and utilization* of the property are the criteria for determining its exemption from taxation (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *States v. Doss*, 146 Fla., 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummas v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78).

Ownership is not sufficient; there must also be utilization for one or more of the purposes mentioned in the above two sections of the state constitution. In determining questions of this nature their answer must be determined largely from the facts showing use and utilization of the property. Unless the property held by a non-profit corporation, although it may have been incorporated as an educational, literary, charitable, religious or scientific corporation, is held and used for some municipal, religious, scientific, educational, literary or charitable purpose there may be no exemp-

tion. There is nothing before us or to be gleaned from the file showing that any real property that may now be owned by the above named non-profit corporation is used for any of the purposes mentioned in said §1, Art. IX, and §16, Art. XVI, State Const. Until such an utilization is shown there may be no tax exemption.

The corporate charter on file in the office of the clerk of the circuit court for Leon county shows a possibility that the corporation may have been designed to hold properties for a time in trust for the state board of control or the state board of education; however, as there is no evidence before us that any property, upon which exemption is claimed, is held in this capacity this point will not be discussed or determined.

These observations seem to answer the above question as well as it may be answered under the facts and circumstances before us and we hope furnish a rule to be applied by the tax assessor in determining the taxability or exemption from taxation of property held by the above corporation and like and similar corporations.

057-32—February 7, 1957

TAXATION

TAXATION OF TANGIBLE PERSONAL PROPERTY ON MILITARY RESERVATIONS

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where tangible personal property, belonging to a resident of this state, is located on a military reservation in this state, over which exclusive jurisdiction has been ceded by the state to the federal government, is such property subject to taxation under the statutes of this state in the county where so located, where the owner thereof is a resident of another county?

It seems clear from the authorities that such property is not subject to taxation by the county or local taxing units as having a tax situs on the military reservation (*Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455, 74 L. ed. 1091, text 1098, 84 C. J. S. 62-64 §12) unless such taxation be specifically authorized by the federal statutes or laws. Although gasoline taxes, sales and use taxes and income taxes have been authorized (§104.110, title 4 of the U. S. code) on such federal reservations, we find no statute or law permitting the ad valorem taxation of such property by state or local taxation on military reservations where exclusive jurisdiction has been ceded by the state.

This answers the above question in the negative. There being no right of taxation, there can be no enforceable lien.

Your file presents a further question of whether or not the property was subject to taxation in the county of the residence of its owner; however, time will not permit the preparation of an opinion on that question at this time, therefore, your file will be retained by us until the answer to this question can be determined and an opinion rendered.

057-34—February 7, 1957

TAXATION

HOMESTEAD TAX EXEMPTION—INTEREST OF BENEFICIARIES UNDER A WILL—§7, ART. X, STATE CONST.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Where under a will probated in this state the real and personal property of a decedent is vested in a trustee who is directed by said will to pay, from the principal and income of the trust estate, certain moneys in support and maintenance of three named persons during their lifetime, with the remainder of the estate upon the death of the last survivor going to certain named persons or their heirs or devisees, may the three beneficiaries or any of them residing and making their permanent home upon real property of the estate claim homestead tax exemption?

Under the said will payments to the three named beneficiaries may be made from principal and income and there is no obligation upon the trustee to make payments to such beneficiaries in equal amounts. The payments to the said beneficiaries under the will clearly are for the maintenance and support of such beneficiaries and in the amounts deemed necessary by the trustee for the support of them individually. We find nothing in the will vesting in the beneficiaries any title to the trust estate other than the right to be paid such support and maintenance as the trustee shall determine necessary or proper. The beneficiaries have no control over the properties of the estate and will never become vested with title thereto except as paid to them as support and maintenance as aforesaid.

We doubt that the beneficiaries above mentioned have either a legal or equitable title to the real property of the trust or any of it within the contemplation of §7, Art. X, State Const. (see 90 C. J. S. 68, et seq., §§180 et seq.), neither do we think that the trustees, although vested with the legal title and maybe the equitable one, may claim homestead tax exemption.

The above question is, therefore, answered in the negative. We have dealt only with the present status of the beneficiaries under said §7, Article X, State Const.

057-35—February 7, 1957

TAXATION

TAX ON GASOLINE—EXEMPTION FOR AGRICULTURAL PURPOSE—CONSTRUCTION OF §§208.47, ET SEQ., F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Is a fish hatchery producing live bait for commercial sale an agricultural purpose within the purview of §§208.47, et seq., F. S.?

In substance §§208.47, et seq., F. S., exempt gasoline and like products used in power equipment "used exclusively on a farm or for producing farm products on a farm" and for commercial fishing purposes. The question does not embrace commercial fishing pur-

poses and such purpose is excluded from this opinion. This brings us to the question of what is a farm and what is farming.

We have examined an annotation in 3 A. L. R. 2d 544-571; 16 Words and Phrases, 248-253, 255-260 and 261-263; 35 C. J. S. 746-752; and other definitions of the term "farm," "farmer" and "farming," and find nothing therein indicating that the operation of a fish hatchery is farming or the hatchery a farm. In *Dunkly v. Erich*, CCA 9th., 158 Fed. 2d 1, it was held that raising fish for commercial sale was not farming. It was stated in this case that fish was not livestock. We find nothing in the statutes or the reports which would tend to support a holding that the operation of a fish hatchery for the production of live bait is within said §§208.47, et seq., F. S.

The above question is answered in the negative in so far as it relates to operation of a fish hatchery for the purpose of producing live bait for sale.

057-36—February 8, 1957

LEGISLATURE

LEGISLATIVE INVESTIGATION COMMITTEE—WITNESS
SUBPOENAS, CONTEMPT CITATIONS—CH. 31498,
(EXTRAORDINARY SESSIONS, 1955, 1956),
§9, ART. III, STATE CONST.

To: *Mark R. Hawes, Chief Counsel, Legislative Investigation
Committee, Tallahassee*

QUESTIONS:

1. Can witnesses who fail to respond to subpoenas or who refuse to testify before the Florida legislative investigation committee be cited for contempt directly by the committee?

2. If not, can such citation be issued by the senate or the house or both after the legislature convenes?

AS TO QUESTION 1:

The act of the legislature creating this committee known as Ch. 31498 (extraordinary sessions 1955-56) authorizes the committee to "require by subpoena or otherwise the attendance of such witnesses. . . ."

Section 9, Art. III, State Const., provides:

SECTION 9. *Contempt of legislature.*—Either house during the session may punish by fine or imprisonment any person not a member who shall have been guilty of disorderly or contemptuous conduct in its presence, or of a refusal to obey its lawful summons but such imprisonment shall not extend beyond the final adjournment of the session.

I can find no provision of law which authorizes the committee to directly cite the refusing witness for contempt.

Therefore, the 1st question is answered in the negative.

AS TO QUESTION 2:

It appears that the answer to this question is governed by §9, Art. III, Fla. Const., and that either house during the session could punish for the contempt by imprisonment *but such imprisonment shall not extend beyond the final adjournment of the session.*

057-37—February 8, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
AUTHORITY OF COUNTY COMMISSIONERS TO PROCURE
LIABILITY INSURANCE—PUBLIC RECREATIONAL
PARK—MARION COUNTY—\$455.06, F. S.**

To: Virgil L. Milbrath, County Attorney, Ocala

QUESTION:

Where the board of county commissioners, pursuant to a lease granted it by the department of the U. S. army, undertakes to operate a public recreational park and area within said county as lessee, may it procure a policy insuring the county against liability and property damage and pay the premiums therefor from county funds?

A county is not liable for torts committed by it while performing a governmental function (Aaron v. Palm Beach County, 159 Fla. 516, 32 So. 2d 165, and cases cited therein). It was also held in Bragg v. Board of Public Instruction, Duval County, 160 Fla. 590, 36 So. 2d 222 that the board of public instruction was not liable in tort where the plaintiff was injured by a printing press operated in the performance of a required part of the public school curriculum.

The legislature, by the enactment of §455.06, F. S., gave specific authority to certain public officers, including those of the county, to procure liability and property damage insurance upon vehicles owned or leased by them and operated upon the public highways or streets of municipalities in the state and to pay the premium therefor. It should be noted, however, that the provisions of said statute by sub§(3) thereof are made inapplicable to Marion county.

The case of Suwannee County Hosp. Corp. v. Golden, 56 So. 2d 911, holds that a county hospital may be liable in tort to a paying patient for the negligence of its agents or servants. The case is bottomed upon the proposition that where a county operates such a hospital it is performing a proprietary function. There is very significant language found on pp. 913-914 as follows:

(3) An enterprise is not governmental in character simply because the government enters it or the legislature declares it so. Whether it be governmental or proprietary depends on the nature of the business and the determination of the courts. We can only wonder when the entry of government into businesses as well and as readily operatable by individuals will cease. If the government undertakes to enter other fields such as amusement, entertainment, transportation, and communication, as is the present trend, on a basis that makes the competition one-sided because of the taxation feature, should the situation be made more unfair by declaring that inasmuch as the government is involved, no redress should be secured to one injured by negligence in the operation?

In many instances it is quite difficult, if not impossible, to distinguish between proprietary and governmental functions.

While it is not apparent the extent to which your recreational area will be developed, that is to say whether the same will have concessions for which fees will be charged, it does appear from the

language quoted above there is strong likelihood that the county may be held liable for its torts committed in the operation of a park or recreational area. At least the trend appears to so indicate. For this reason I conclude that the county may procure liability and property damage insurance with reasonable limits covering the recreational or park area.

The question, then, is answered in the affirmative.

057-38—February 11, 1957

LEGISLATURE

LEGISLATIVE INVESTIGATION COMMITTEE—WITNESS FEES—§§11.08 AND 11.09, F. S.

To: *Henry W. Land, Chairman, Legislative Investigation Committee, Apopka*

QUESTION:

What fees, if any, would be authorized to witnesses appearing before your committee?

This question is clearly answered by §11.09, F. S., which states:

Pay of witnesses.—All witnesses summoned before any committee mentioned in §11.08, shall receive two dollars for each day's actual attendance and also five cents per mile for actual distance traveled to and from the place required to appear and give such testimony.

The Florida legislative investigating committee is a duly constituted legislative committee within the provisions set forth in §11.08, F. S., mentioned in the above quoted section.

057-39—February 12, 1957

CRIMINAL PROCEDURE

JUDGMENTS AND SENTENCES—WHEN CONSECUTIVE AND WHEN CONCURRENT—§921.16, F. S.

To: *John A. Madigan, Jr., Attorney, Sheriff's Ass'n, Tallahassee*

QUESTION:

A person is convicted of a crime in the county judge's court of Franklin county on one day and subsequently on the next day the person is convicted of another crime in the circuit court of Franklin county and is sentenced to the state prison. After his release from the state prison, must the sentence imposed by the county judge's court be served, and, if so, can the sheriff of Taylor county arrest the person on his release from the state prison?

A sentence imposed by a court of this state must be served. The question here is basically whether or not the sentence of the county judge's court and the circuit court run concurrently or consecutively. In a recent Florida case of *Franey v. Mayo*, 83 So. 2d 421, a similar situation was handled by the supreme court and the supreme court said:

We think the two transactions, that is prosecutions, in the two courts were independent and should be considered separately. The courts were located in different places, they exercised different jurisdiction and, so far as we are advised, neither court knew of the sentences imposed on

petitioner in the other. Under the pertinent statute, §921-16, *supra*, sentences not ordered to run concurrently must run consecutively. We apprehend that one reason for such a law is a situation like the present one. One convicted of crime in more than one court cannot serve a sentence and then claim that he was simultaneously serving a sentence imposed elsewhere.

Therefore, it is clear that the prisoner must serve the sentence imposed by the county judge's court upon his release from the state prison.

The sheriff of Taylor county is certainly authorized to arrest the prisoner upon his release in Taylor county and the authority for his arrest would be the judgment and sentence of the county judge's court in Franklin county.

Payment to the sheriff of Taylor county for the services rendered in apprehension of the criminal would be as in all other cases where the sheriff serves process and orders in accordance with taking a person charged with a violation of the law into custody and that when he so acts that he receives compensation therefor.

The question is answered in the affirmative.

057-40—February 13, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
EXPENDITURE OF COUNTY FUNDS FOR CONSTRUCTION
OF SIDEWALK ADJACENT TO SCHOOL PROPERTY—
§129.09, F.S.**

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

In view of the provisions of §129.09, F. S., may the clerk of the circuit court, acting as county auditor, properly sign a warrant for the payment of an indebtedness where such is incurred by the board of county commissioners for the construction of a sidewalk in a school area and the sidewalk lies wholly within the corporate limits of a municipality?

Section 129.09, F. S., makes a clerk of the circuit court, acting as county auditor, personally liable for the amount of any warrant he signs for the payment of a claim against the county where the same may be an illegal charge against the county or not authorized by law, also subjecting the clerk to a criminal penalty.

Mr. Nichol's letter indicates his concern over the request of the city of Palatka to the county commission to construct a sidewalk wholly within the corporate limits of the city of Palatka, which sidewalk will serve a public school area.

Section 235.36, F. S., reads:

235.36 County commissioners may improve roads and sidewalks.—The boards of county commissioners of the state may pave and maintain any road, byway, or sidewalk, adjacent to, or running through, the property belonging to any school district or other public free school district or other public free school of any county in the state, where the material and equipment is available for such paving, or maintenance; and it is declared that

such paving, or maintenance, of such roads, byways or sidewalks, is a public county purpose; provided, that such action upon the part of the boards of county commissioners is not required by this section to be mandatory but discretionary.

It is seen from this statute that the board of county commissioners, in its discretion, may construct a sidewalk adjacent to or running through property belonging to a public school in the county. If the proposed sidewalk is adjacent to school property the fact that the same may lie wholly within the corporate limits of a municipality would not in itself deny to the board of county commissioners the authority granted by the statute.

Consequently, based upon the assumption that the proposed sidewalk is one contemplated by §235.36, F. S., the question is answered in the affirmative.

Enclosed is a copy of opinion 050-387, dated Aug. 8, 1950 (AGO 1949-1950, p. 393) pointing out that a road or highway lying wholly or partly within a municipality may also answer a county purpose and county funds may, therefore, be expended for its construction and repair.

057-41—February 13, 1957

CRIMINAL PROCEDURE

JUDGMENTS AND SENTENCES—FELONIES, PUNISHMENT FOR SECOND CONVICTION—§§775.09, 856.04, F. S.

To: *Richard H. Cooper, County Solicitor, Orlando*

STATEMENT OF FACTS:

The defendant committed the felony of withholding support from minor children on June 11, 1956. On Sept. 26, 1956, the defendant pleaded guilty to the charge and was adjudged guilty in the criminal court of record in and for Orange county. On that same date, Sept. 26, 1956, imposition of sentence was suspended by the court on the charge of withholding support.

On Sept. 30, 1956, defendant committed the felony of larceny of a motor vehicle. To this charge defendant pleaded guilty on Dec. 12, 1956, and on that same date was adjudged guilty by the court. The court on Dec. 12, 1956, sentenced the defendant to two years in the state prison on the auto larceny case and sentenced him to six months in the state prison on the withholding support case. The defendant began serving his sentences on Dec. 12, 1956, and is serving them at the present time.

QUESTION:

Under the above stated facts, may the defendant properly be charged as a second offender under §775.09, F. S.?

All that §775.09, F. S., requires in order to render a person subject to the enhanced penalty therein provided is that such person, "... after having been convicted within this state of a felony . . . , commits any felony within this state. . . ."

Your letter states that the defendant committed a felony on September 30, 1956, and that he was thereafter adjudged guilty thereof and sentenced therefor. The adjudication of guilt constituted a conviction (*Washington v. Mayo*, 77 So. 2d 620). The

question arises, then, as to whether this felony was committed after the defendant had previously been convicted of a felony.

Your letter states that on September 26, 1956, he was adjudged guilty of withholding support from his minor children, an offense denounced by §856.04, F. S., which specifically denominates it a felony. This adjudication of guilt constituted a conviction (*Washington v. Mayo*, *supra*).

So it is that the defendant was convicted of a felony on September 26, 1956, and thereafter on September 30, 1956, committed another felony, of which he was thereafter convicted, with the result that he comes within the provisions of §775.09.

Therefore, your question is answered in the affirmative.

057-43—February 15, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—DEDUCTIONS FROM COMPENSA-
TION OF COUNTY OFFICERS AND EMPLOYEES—§§112.10,
122.03, 215.28 ET SEQ., F. S.**

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

May the board of county commissioners and county officers make payroll deductions from the salary checks or warrants of county officers and employees, with the consent of such officers and employees, for any purposes, where such deductions will be accumulated and paid to others?

This opinion will not deal with deductions for retirement contributions, the purchase of war bonds, insurance premiums and federal income and social security taxes, where authorized or required by special statutory provisions (see §§112.10, 122.03, 215.28, et seq., F. S., and federal revenue statutes). The authorization of the deductions comprehended by the above question would be in the nature of partial assignments of salaries and other obligations. "In most, if not all, states a partial assignment of a claim or chose in action is not recognized and enforceable by law, except to the extent a partial assignment is authorized by statute or is made with the consent or ratification of the debtor or drawee" (6 C. J. S. 1088, §39). This rule is for the benefit of the debtor, on the principle that he should not have claims against him split up so as to require him to pay numerous persons, without his consent, except as required by law. Under this rule, in the absence of statute, a county board or officer is not required to recognize assignments or deductions from salaries of public officers; however, unless otherwise prohibited by law, they may recognize and make deductions with their consent when so requested by the officer or employee.

By the very nature of recognizing and executing such deductions more bookkeeping might be required, and additional checks or warrants would also be required, thereby entailing possible additional expense to the employing board or officer. At least in theory such additional expense would usually, either directly or indirectly, have to be made from public funds. Where made from the accounts of fee officers there would, at least in theory, be a reduction, however slight, in the excess fees of the officer. This

fact would seem to technically prohibit the extra bookkeeping and additional checks or warrants.

We feel that the above question should be answered in the negative, unless, the board or officer being willing to make such deductions, the same may be accomplished without public expense. Where the same may be accomplished without public expense, then the question is answered in the affirmative.

057-44—February 19, 1957

TAXATION

TAXATION OF TANGIBLE PERSONAL PROPERTY ON MILITARY RESERVATIONS—§§192.01, 200.02 AND 200.27 ET SEQ., F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Where tangible personal property, belonging to a resident of this state, is located on a military reservation in this state, over which exclusive jurisdiction has been ceded by the state to the federal government, is such property subject to taxation under the statutes of this state in the county of the residence of the owner thereof?

The said property is not subject to taxation by the county or local taxing unit wherein the said military reservation is located where the owner thereof is a resident of another county or taxing unit (*Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455, 74 L. ed. 1091, text 1098; 84 C. J. S. 62-64, §12; opinion 057-32); however, this does not dispose of the question of the right of the county of the residence of the owner to assess the said property for ad valorem taxation.

In *Howard v. Louisville*, 344 U. S. 624, 73 S. Ct. 465, 97 L. ed. 617, where an ordinance plant covered a portion of the city of Louisville by the extension of the municipal limits, the court remarked that "a change of the municipal boundaries did not interfere in the least with the jurisdiction of the U. S. within the area or with its use or disposition of property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the federal government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is *friction*, not *fiction*, to which we must heed." The taxation of the property at the residence of the owner, so long as there is no interference with the jurisdiction of the federal government over such property in connection with the operation of the military reservation, would seem to be permitted. This brings us to the question of the authority of the county of the residence of the owner of the tangible personal property to tax the said property although not physically present in such county.

Section 192.01, F. S., provides that "Unless expressly exempted from taxation, all real and personal property *in this state*, and all personal property *belonging to persons residing in this state*, shall be subject to taxation in the manner provided by law." (Emphasis supplied.)

In *Lee v. Atlantic Coast Line*, 145 Fla. 618, 200 So. 71, text 75,

it was stated that "where personal property is located in a state, the taxing situs of such property may be regulated by statute when no other controlling law is violated." In *Atlantic Coast Line v. Amos*, 94 Fla. 588, 115 So. 315, text 320, the court said that "the general rule is that the situs of personal property for the purpose of taxation is primarily at the domicile of the owner, subject to certain exceptions, such as the acquisition of a fixed status different from that of the owner . . ." To the same effect see also *Hunt v. Turner*, 54 Fla. 654, 45 So. 509, text 513-514, and other cases relating to intangible personal property. In 84 C. J. S. 666, §332, it is stated that "unless otherwise provided by law, it has been held that *tangible* personal property of a corporation is taxable at the domicile or residence of the corporation, or at its principal place of business, or where its business is being carried on." In 51 Am. Jur. 466, §451, it is stated that "as between taxing units within the state, *tangible* personal property is ordinarily taxable to the owner in the county, town, municipality or other taxing district in which the owner has his domicile if the property has not acquired a taxable situs elsewhere, and in case of property owned by a corporation, at the place where the principal business of the corporation is transacted." See also annotation in 110 A. L. R. 709-714.

The phrase "and all personal property belonging to persons residing in this state," appearing in §192.01, F. S., above quoted appears to have appeared for the first time in Ch. 5596, 1907. Prior to that statute the right to tax under the statute was "all real and personal property in this state."

We are inclined to the view that under the above statutes and authorities the above stated question should be answered in the affirmative, so long as there is no federal statute expressly providing for the assessment of such property by the county or taxing unit wherein the property in question is located on a federal reservation. Although such property is subject to taxation at the residence of the owner, it may not be seized for unpaid taxes while on the federal reservation, in the absence of federal statutes so providing, but the said tax may be collected by enforcement against other personal property of the taxpayer in the manner provided by §§200.02 and 200.27, et seq., F. S.

057-45—February 19, 1957

TAXATION

AD VALOREM TAXATION—TAXABILITY OF TRUSTS FOR GRAVE CARE

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Are trust funds set up to provide for the care and maintenance of graves or other burial crypts or niches subject to ad valorem taxation in this state?

This question contemplates a trust fund, the principal and income of which will be used exclusively for the upkeep, care and maintenance of a grave or graves or other burial place of the dead. The principal and income of the trust will be used for such upkeep, care and maintenance exclusively and no portion of the corpus of the trust will ever pass to any use other than the said upkeep, care and maintenance.

"The exemption accorded to cemetery lands may extend to all property used or held exclusively for the burial of the dead or for the care, maintenance or upkeep of such property, and ordinarily applies to a columbarium, a crematory, a mausoleum . . ." (84 C. J. S. 601, §292). Such trusts have been held to be exempt from inheritance taxes (85 C. J. S. 972, §1160). Burial expenses have been held to include perpetual care and maintenance of the grave of the decedent and not a part of a decedent's estate for distribution (85 C. J. S. 1036, §1184). Exemption of cemeteries and cemetery lots is favored on the grounds of public policy. One main reason for such exemption is the difficulty of collecting a tax on such property and the obvious impropriety of selling graves of the dead in order to collect taxes to carry on the government of the living (51 Am. Jur. 612, §645).

We feel that where the amount of a trust set up for the upkeep, maintenance and care of a grave or graves of the dead is reasonable in amount with relation to the upkeep, maintenance and care contemplated and to be done and it is contemplated that the principal, as well as the income, of the trust will eventually be used for such purpose, and that no part thereof will ever pass to remaindermen, such a trust is exempt from ad valorem taxation in this state.

The above question is answered in the negative under the limitations above set out.

057-46—February 19, 1957

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—RELATIONSHIP OF §§320.59 (GUEST STATUTE) AND 342.051(2) (FINANCIAL RESPONSIBILITY LAW)

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Where the operator of a motor vehicle has a "guest" passenger, within the contemplation of §320.59, F. S., and is involved in an accident in connection with his operation of said vehicle, may the insurance commissioner invoke the provisions of §324.051(2), F. S., solely in connection with bodily injury suffered by said guest passenger in such accident?

The effect of §320.59, F. S., is to restrict liability of the owner or operator of a motor vehicle in relation to injury to a guest passenger in such vehicle in an accident involving such vehicle to those instances when the accident is caused by "gross negligence and willful or wanton misconduct," which is the proximate cause of the injury to such a passenger. There is the proviso that the question or issue of negligence, gross negligence, willful or wanton misconduct, and proximate cause, and the issue of assumed risk, shall in all cases be solely for the jury. A further proviso excepts school children and other students being transported under circumstances mentioned.

Chapter 324, F. S., is our financial responsibility law. Section 324.01, F. S., states, among other things, that it is the intent of the chapter that the owner or operator of a motor vehicle involved in an accident on the public streets and highways of this

state shall respond for damages and show proof of responsibility to respond for damages in future accidents as a requisite to operating a motor vehicle on such streets and highways of Florida.

Section 324.051(2), F. S., provides the circumstances under which the insurance commissioner shall suspend licenses of operators and registrations of owners of motor vehicles in event of accidents involving motor vehicles resulting "in bodily injury or death to any person" or total damage of \$50 or more to property. The words last quoted reasonably include a "guest" passenger in connection with whose injuries the owner or operator of the motor vehicle in which he was riding is subject as a matter of law to action for damages.

Prior to revision of our financial responsibility law, one of the grounds exempting the operator of a motor vehicle involved in an accident from the suspension features of the law was that the commissioner determined that such operator "clearly did not cause or contribute to the cause of said accident." Such revision removed that ground of exemption; and in our opinion 055-220 we dealt with this matter of fault on the part of the operator of a motor vehicle involved in an accident, and quoted from *Ballou v. Reeves, Ky.*, 238 S. W. 2d 141, on the point, a part of which is here repeated: "The question of negligence has nothing to do with the matter. The requirement of financial responsibility does not in any sense pre-determine the question of liability, which could only be decided in a judicial proceedings."

Whether an accident results under circumstances rendering liable the owner or operator of a motor vehicle in relation to a "guest" passenger is for a jury to decide if action is brought. If such a "guest" passenger, as contemplated by §320.59, F. S., is injured as result of a motor vehicle accident, the owner and operator of the vehicle in which the passenger was riding are subject to the suspension features of §324.051(2), F. S. Hence, the question as discussed and conditioned is answered in the affirmative.

057-47—February 19, 1957

BANKS AND BANKING

DEPOSITORIES—DEPOSITS BY GUARDIANS, CURATORS, EXECUTORS, ADMINISTRATORS, TRUSTEES—§§69.15 AND 658.02, F. S.

To: *Robert L. McCrary, Jr., President, County Judges' Ass'n, Marianna*

QUESTION:

Is a federal savings and loan association a bank or trust company within the contemplation of §69.15, F. S., so as to be eligible for designation as a depository under said statute?

Section 69.15, F. S., in part provides:

(1) Whenever it shall be deemed expedient in the judgment of any court having jurisdiction of any estate in process of administration by any guardian, curator, executor, administrator, trustee, receiver, or other officer, because the size of the bond required of such officer shall seem burdensome or for other cause, the court may order

the deposit of such portion or all of the personal assets of the estate, as it shall deem proper, in such *bank or trust company doing business in this state*, as the court shall designate as depository therefor, consideration being given to any bank or trust company proposed by the officer (Emphasis supplied.)

Under the definitions found in the banking code, §658.02, F. S., a "bank" is defined as:

(1) "Bank" means any person doing a banking business whether subject to the laws of this or any other jurisdiction other than industrial or Morris plan banks operating under the provisions of chapter 656, and savings banks operating under the provisions of chapter 654.

A "trust company" is defined in sub §(14) as:

(14) "Trust company" means a corporation or the trust department of a bank which is authorized to engage in the trust business.

Also, sub §(13) reads:

(13) "Trust business" means the business of acting as executor, administrator, guardian of estates, assignee, receiver, depository or trustee under the appointment of any court, or by authority of any law of this or any other state or of the U. S., or as trustee for any purpose permitted by law.

These statutory definitions would seem to exclude, from those that may be designated a depository within the purview of said §69.15, F. S., federal savings and loan associations inasmuch as they do not conduct the business of a commercial bank or trust company. Federal savings and loan associations are created ". . . to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes . . ." (Title 12, §1464(a), U. S. C. A.). A federal savings and loan association does not do a general banking business, but it is set up to provide thrift institutions and financing of homes. (*North Arlington Nat. Bk. v. Kearny Fed. Sav. & Loan Ass'n*, C. A. N. J., 187 F. 2d 564, cert. denied, 72 S. Ct. 30, 342 U. S. 816, 96 L. Ed. 617).

The question is answered in the negative.

057-48—February 19, 1957

REGULATION OF PROFESSIONS AND VOCATIONS

ARCHITECTURE, PRACTICE OF—PROFESSIONAL ENGINEERS—§§467.09 AND 509.211(2), F.S.

To: *Morton T. Ironmonger, Secretary-Treasurer, State Board of Architecture, Fort Lauderdale*

QUESTION:

Are professional engineers authorized to practice architecture under the provisions found in §509.211(2), F. S., which read as follows: ". . . before the erection or remodeling of any building for use as a hotel, apartment house, rooming house or restaurant is begun the registered architect's plans or registered professional engineer's plans with detailed specifications shall be approved by the supervising architect of the hotel commis-

sion; and all plans, specifications and drawings submitted for the purpose of securing building permits from any state, county or municipal building inspector or other officer having like jurisdiction, shall bear the signature and seal of the architect and supervising architect of the hotel commission before said building permit is issued; . . .”?

You state in your letter in which you pose the above question that a few engineers are practicing architecture under the shroud of the provisions set out in the question.

The practice of architecture in Florida is controlled and regulated by the state board of architecture under the authority of the laws found in Ch. 467, F. S., and the practice of engineering in Florida is controlled and regulated by the state board of engineer examiners under the authority of the laws found in Ch. 471, F. S. Section 467.09, F. S., recognizes that the practice of architecture and the practice of professional engineering is overlapping, to some degree, and said section has provided that no state law shall “. . . be held to prevent registered professional engineers or their employees or subordinates under their responsible supervising control from performing architectural services which are *purely incidental to their engineering practice* or registered architects or their employees or subordinates under their responsible supervising control from performing engineering services which are *purely incidental to their architectural practice.*” (Emphasis supplied.)

Section 467.09 further provides that “no professional engineer shall practice architecture” and that “no architect shall practice engineering.”

Section 9 of Ch. 6951, 1915, which is a part of the law creating the state board of architecture for the regulation and practice of architecture in the state, provided that engineers should not be regarded as architects unless they planned, designed or supervised the erection of buildings, but that if they did such things they became subject to the provisions of the law regulating the practice of architecture and were regarded as architects. The provision that an engineer may perform architectural services which are purely incidental to the practice of engineering did not appear in the original act, but such provision was made a part of the law regulating the practice of architecture in Ch. 20651, 1941, as was the provision for architects to perform engineering services which are purely incidental to the practice of architecture.

The provisions of §467.09, F. S., permit the professional engineer to practice that part of architecture which overlaps into the field of engineering under his certificate as an engineer, but said provisions clearly prohibit the professional engineer to practice architecture in general. Likewise said provisions permit the architect to practice that part of engineering which overlaps into the field of architecture, under his certificate as an architect, and likewise said provisions prohibit the architect from practicing engineering in general. The legislature seems to have limited the overlapping field in which an engineer or architect may practice in the other's field to the performance of those services which are purely incidental to the practices in his own field.

The provisions of said §509.211(2), F. S., stated in the question, cannot be construed as to authorize the general practice of architecture by a professional engineer. The professional engineer, of course, may perform architectural services which are purely incidental to the practice of engineering. Whether architectural services performed by the professional engineer are purely incidental to the practice of engineering or whether such services are in reality a practice of architecture depends upon the facts and circumstances in each individual case.

These observations answer the above question as well as it may here be answered.

057-49—February 19, 1957

CIVIL PRACTICE AND PROCEDURE

JUDGMENTS AND EXECUTIONS—CONDITIONAL VENDEE'S INTEREST IN PERSONAL PROPERTY SUBJECT TO EXECUTION—§§55.20-55.25, F. S.

To: *S. Perry Penland, Attorney for Sheriff, Duval County, Jacksonville*

QUESTION:

Where an execution is placed in the hands of a sheriff for levy, may he, pursuant thereto, levy upon the interest of a vendee having possession of the property under a retained title or conditional sales contract?

Section 55.20, F. S., reads:

55.20 Property subject to execution.—Lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution.

Certain interests or properties subject to execution are found in §§55.21-55.25, F. S.

The right of the vendee under the conditional sales or retained title contract is an equitable interest. Of course, upon payment of all sums and meeting all conditions required under said contract that interest ripens into legal title to the property. The case of *Thalheimer v. Tischler*, 55 Fla. 596, 46 So. 514 holds that a lease of real estate for a term of years wherein the lessee is given an option to purchase does not give the lessee such an interest in the premises as may be made subject to sale under an execution at law, but that such interest can only be disposed of and sold under a decree in equity. See, also, *Tischler v. Robinson*, 56 Fla. 699, 48 So. 45, to the same effect. We do not find any cases in Florida dealing specifically with the question under consideration.

"... The majority rule is that in the absence of statute the vendee has no such interest prior to the payment of the purchase price, even though it is admitted that the vendee has an interest in the property which he may sell or assign prior to performance of the condition, unless the vendor has waived the condition. The vendee's right of possession and use is not a leviable interest, and delivery of the property and payment of part of the purchase price does not convey any title or confer any interest ... which makes

the property subject to . . . sale or execution by his creditors" (47 Am. Jur., §878, Sales). The same general rule is stated in 78 C. J. S., §635, Sales, although it is recognized there is a conflict of authority. The annotation found in 61 A. L. R. 781 deals with the subject of the interest of the vendee under a conditional sales contract as subject to attachment, garnishment or execution. It states the majority rule on p. 782 as follows:

The majority rule is that the buyer, under a conditional sales contract reserving title in the seller until payment of the purchase price, has no such interest in the property, prior to payment of the purchase price, as is subject to attachment, or levy and sale, at the instance of his creditors.

Cases are cited from California, Connecticut, Indiana, Nevada, New Jersey, New York, Ohio, Oklahoma, Rhode Island and Vermont. The contrary view apparently is taken by Alabama. See *Moody v. U. S. Fidelity & Guar. Co.*, 137 So. 308 and *Mitchell v. Conway*, 60 So. 2d 676. Finally, the A. L. R. annotation at p. 792 summarizes as follows:

The following general rules may be gathered from a review of the cases in this annotation:

Generally, in the absence of statutory modification, it seems that the conditional vendee has no such interest in the subject of the conditional sale, prior to payment of the purchase price, as is subject to levy and sale by his creditors. Mere payment of a portion of the purchase price does not confer upon the vendee any attachable interest therein which makes the property subject to seizure and sale on execution.

We have not overlooked the case of *Livingston v. Nat. Shawmut Bank of Boston, Fla.*, 62 So. 2d 13 where the court, in considering the effect of a sale under a conditional sales contract, quoted from the opinion in *G. F. C. Corp. v. Spradlin, Fla.*, 38 So. 2d 679, construing the provisions of §319.27, F. S., relating to rights of lien holders, etc., as follows:

The plain intent and meaning of this statute is that a person in possession, dominion, and control of an automobile purchased under a retain title or conditional sale contract and who consequently owns the equitable or beneficial title thereto, is considered as the owner of the vehicle, and that any contract or agreement by whatever name called which has as its ultimate object the payment of the purchase price for the vehicle is to (be) treated purely as a lien for the purchase money or as security for the payment or satisfaction of the debt or obligation described therein.

Until a court of competent jurisdiction says otherwise, we do not construe this language to mean that there is such an interest in the vendee as will make his rights in and to the personal property subject to levy of execution and sale thereunder.

We do not here consider the question of what rights, if any, the judgment creditor may have in a court of equity to subject the equitable interest of the vendee to the payment of sums due him.

The question is answered in the negative.

057-50—February 19, 1957

ELECTORS AND ELECTIONS

LOCAL OPTION ELECTIONS—SALE OF INTOXICATING BEVERAGES—DUTY OF SUPERVISOR OF REGISTRATION—§567.01, F. S. AND §1, ART. XIX, STATE CONST.

To: *Hugh E. Carlton, Supervisor of Registration, Bartow*

STATEMENT OF FACTS:

A petition under and for the purposes set forth in §567.01, F. S., has been filed with the board of county commissioners of Polk county. The same has been referred to the supervisor of registration "to determine if the petition is sufficient," and the supervisor is now in the process of checking the signatures to the petition against the official records in his office. He states that neither he nor his deputies are qualified handwriting experts. He then submits the following questions:

QUESTIONS:

1. Is the supervisor correct in assuming that his only duty in this matter is to verify the names on the petition with the names of the legally registered voters without reference to signatures and to make his report as to whether the petition contains the "names" of one-fourth of the registered voters of Polk county?

2. If the answer to the 1st question is in the negative, does the supervisor have any responsibility in determining the authenticity of the signatures on the petition?

Section 567.01, F. S., provides in part that, "The board of county commissioners of each county shall order an election to decide whether the sale of intoxicating liquors, wines or beers shall be prohibited in said county and if not prohibited, to decide the method of sale, upon the presentation to said board at a regular or special meeting, of a written application asking for such a determination in the county in which said application is made signed by one-fourth of the registered voters of the county. The signature of each registered voter shall be personally signed to such application."

On Oct. 17, 1956, we issued opinion 056-307 to the county attorney of Nassau county, relating to the duties of a board of county commissioners concerning such a petition, copy attached.

Attention is directed to such opinion and the conclusions reached therein to the effect that the determination of the sufficiency of petition under §567.01, F. S., rests upon the board of county commissioners, the statement being supported by *State v. Gessner, Fla.*, 26 So. 2d 896. In further support of that conclusion, attention is also directed to the clear wording of §567.01 and of §1, Art. XIX, State Const. Despite the statement in the request for opinion that the board has referred such petition to the supervisor "to determine if the petition is sufficient," that determination may not be made by the supervisor but only by the board. Hence, we construe the quoted statement to mean that the petition has been referred to the supervisor by the board for the purposes of his advising them (1) the total number of registered electors in

Polk county on the date the petition was presented to the board, and (2) according to his records the number of qualified electors on said date who signed such petition. It is that second item that is disturbing. There is a practical and common sense area in which the supervisor can function with respect to it without assuming to perform as a handwriting expert and without assuming to make a determination with respect to the sufficiency of such petition.

In view of the last reported total number of registered electors in Polk county, it is assumed that the petition which has been referred to the supervisor has not less than approximately 16,000 signers. If the petition is found by the board to be sufficient, the election must be held within 60 days of date of filing of the petition. Notice reasonably must be given to the public concerning holding of the election. Obviously, time is a factor. To reasonably and sensibly check the number of signatures to the petition here involved, in view of the time factor, the supervisor must rely upon his deputy or deputies to assist him. The supervisor and his deputies are not called upon to be handwriting experts; they are called upon to check the signatures to the petition against the registration records so that the supervisor may make his report of such check to the board.

It is noted in §567.01, F. S., that the "signature of each registered elector shall be personally signed." The following is quoted from opinion 056-307: "The fact that a name may not be printed in the registration books in exactly the same manner that it is signed on the petition does not necessarily mean that it is not the name of the same person or that it was not personally signed by such person. Thus, though it is preferable that the names and signatures in the petition be the same as on the registration books, it is not necessary that they be identical."

We assume, without doubt, that the supervisor and his deputies will experience no difficulty in establishing to their satisfaction that a large majority of signers of the petition were duly registered electors of Polk county on the day the petition was presented to the board, or that they were not. The judgment thus required in the comparing of signatures is no greater burden than that required of officials of an election board in comparing signatures on identification slips against those on registration records. The supervisor for instant purposes may rely on the judgment of his deputy concerning the comparison of such signatures where the deputy determines that the signatures are those of the same person. Should a deputy have doubt concerning such signatures, the matter should be called to the attention of the supervisor for his determination. If doubt exists on the part of the supervisor that the signature of a signer of the petition is not the signature of a registered elector as shown on the registration records, he should in each such instance call such doubt to the attention of the board of county commissioners for their determination. In other words, the supervisor and his deputies are not called upon to be handwriting experts; they are required to exercise reasonable judgment.

The above comments would appear to furnish satisfactory answer to the above questions.

057-51—February 28, 1957

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY FINANCES—TRANSFER OF FUNDS—SUPPLEMENTAL BUDGET—NORTHEAST FLORIDA MENTAL HOSPITAL
—§129.06(3) (a) (b), F. S., CH. 29617, 1955.

To: Ray E. Green, Comptroller, Tallahassee

QUESTIONS:

1. Where the board of county commissioners, in its current budget, estimates \$20,000 receipts from the Osceola national forest, which sum is budgeted in the road and bridge fund, but an additional sum of \$5,000 has been received from said forest, may the board apply the \$5,000 surplus credited to the road and bridge fund by transferring the same to the general fund and expend the same in partial payment of the purchase price of lands for the establishment of the northeast Florida mental hospital in Baker county, contemplated by Ch. 29617, 1955?

2. May the board of county commissioners transfer other or additional moneys, which have been deposited to the road and bridge fund, to the general fund for the purpose mentioned in question 1?

AS TO QUESTION ONE:

Chapter 29617, 1955, establishes the northeast Florida mental hospital in Baker county on lands conveyed to the state without cost by Baker county.

Chapter 129, F. S., relates to the county annual budget. Section 129.06 (3)(a)(b), F. S., contains the only authority for transfers of funds within the budget and your situation would not fall within its provisions. The effect of the \$5,000 additional sum will be to increase the budget and, consequently, I do not believe the transfer can be made within the budget proper. However, we call your attention to opinion 051-434, dated Nov. 29, 1951 (AGO 1951-1952, p. 239), permitting a supplemental budget whereby unanticipated funds may be included in a supplemental budget by following the procedure outlined therein. You may follow this opinion in preparing a supplemental budget.

AS TO QUESTION TWO:

In opinion 052-322, dated Nov. 28, 1952 (AGO 1951-1952, p. 240) we considered the transfer of moneys appropriated for the road and bridge fund to another fund to thereby create a new fund in the county budget. As appears from the enclosed copy of the opinion, we held that such transfer could not be effected within the budget because of the restrictions in Ch. 129, F. S., particularly since we were advised that the fund probably was derived from a levy for road and bridge purposes and so earmarked.

The 2nd question is answered in the negative.

057-52—March 1, 1957

REGULATION OF PROFESSIONS AND VOCATIONS

**PHYSICIANS—MEDICAL SCHOLARSHIPS, QUALIFICATIONS
FOR—§458.081, F. S., §1, ART. III, STATE CONST.**

To: *Wilson T. Sowder, M.D., State Health Officer, Jacksonville*
QUESTION:

May an applicant receive a medical scholarship as provided by §458.081, F. S., if he has been a resident of Florida since December, 1948, but did not become a naturalized American citizen until June 7, 1954?

Section 458.081, F. S., provides certain qualifications for recipients of medical scholarships, including, "(2)(a) Have been a citizen and resident of this state for not less than five years prior to the date of his application."

We think it clear that a person may not be a citizen of Florida unless he is also a citizen of the U. S., although it is true that a person may be a citizen of the U. S. without being a citizen of any particular state. Section 2, Declaration of Rights of the Florida constitution, provides, in part, "... but the paramount allegiance of every citizen is due to the Federal government" Section 1, Art. III, Florida Const., relating to electors, provides "... at the time of registration, be a citizen of the United States"

The constitution of the U. S. of America, 1952 edition, prepared by legislative reference service, library of congress, says "Congress' power over naturalization is an exclusive power. A state cannot denationalize a foreign subject who has not complied with federal naturalization law and constitute him a citizen of the United States or of the state, so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of the state" (*Chirac v. Chirac*, 2 Wheat. 259 (1817)). (See also *Steuart v. State*, ex rel *Dolcimascolo*, 161 So. 378, Fla. 1935.)

It is my opinion that the language used in §458.081, F. S., quoted above contemplated that medical scholarships must be awarded only to citizens of the U. S. along with the other stipulated qualifications.

Since the applicant contemplated in your question did not achieve citizenship until June, 1954, the applicant does not meet the statutory requirement at this time that he shall have been a citizen for not less than five years prior to the date of his application.

Your question is therefore answered in the negative.

057-53—March 1, 1957

STATE AND COUNTY OFFICERS & EMPLOYEES

**RETIREMENT—NATIONAL GUARD WHILE EMPLOYEE OF
STATE—§250.22 AND CH. 122, F. S.**

To: *Mark W. Lance, Adjutant General, State Arsenal, St. Augustine*
QUESTION:

May a member of the Florida national guard, duly qualified for retirement under §250.22, F. S., be retired and receive retirement pay, under said section, while an employee of the state or while drawing retirement pay under Ch. 122, F. S., or prior laws?

The member of the Florida national guard in question is ready for immediate retirement, with the rating of captain for retirement purposes, and is presently employed by the state board of health and a member of the state and county officers and employees retirement system and will qualify for retirement under said state and county officers and employees retirement system before the end of the year.

Section 250.22, F. S., provides in so far as here material, that

Any person who shall have reached the age of 64 years, and shall have completed not less than 30 years of service as an officer or enlisted man in the organized militia of Florida (exclusive of time served on the inactive or retired lists) on, before or subsequent to the passage of this section shall be eligible upon his own application, whether on the active or retired list of said organized militia, to be retired under the provisions of this section with the rank or rating held by him at the time of such retirement, and shall receive pay in an amount equal to one-half of the base pay as is now or hereafter may be prescribed in the applicable pay tables for similar grades and periods of service of personnel in the United States army or air force"

And provides further that

Eligibility for retirement under this section shall be in addition to any other retirement that such person is eligible to receive except that any person who elects to retire and is retired under the provisions of this section and who is eligible to receive retirement pay from the state under any other provision of law may not include, *in determining eligibility and benefits for such other retirement, service performed or contribution made while employed by the military department of the state; provided, however, that retirement pay under this section shall be reduced by any amount of retirement pay, pension or compensation which such person is eligible to receive from the federal government for military service*" (Emphasis supplied).

Although prior state and county retirement systems contained a provision that any person who "accepts employment or receives any other compensation from the State of Florida . . . for services rendered shall forfeit all the benefits of" the said retirement statutes, present Ch. 122, F. S., does not seem to contain a like or similar provision sufficient to prevent the payment of retirement compensation to the same person under both §250.22 and Ch. 122, F. S. We find nothing in the statutes prohibiting a person receiving retirement pay under §250.22, F. S., from being employed by the state or any county or municipality thereof.

The above question is therefore answered in the affirmative.

057-54—March 1, 1957

TAXATION

LICENSES—JUNK DEALERS—CONSTRUCTION OF §§205.46 AND 205.47, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is a traveling junk dealer required to obtain an

occupational license and pay a tax under §205.46, F. S., only, or is he required to obtain occupational licenses and pay taxes under both §§205.46 and 205.47, F. S.?

Section 205.47, F. S., was derived from sections 912 and 5664, R. G. S., 1920, which in turn was derived from §30, Ch. 6421, 1918, as amended by §1, Ch. 6923, 1915. Section 205.46, F. S., was derived from §16, Ch. 18011, 1937. It seems clear, from §38 of said Ch. 18011, that §205.46 was not intended as a repeal of the earlier statute. This being true, when the statutes were revised and codified in 1941, §205.46 applied to those junk dealers who operated from movable places of business, itinerant traders having no fixed place of business. Section 205.47 applied to those junk dealers who operated from fixed places of business. A person having both a fixed place of business and a movable place of business was required to obtain licenses and pay license taxes under both said sections. Only where a person operates a movable place of business and has no junk yard or other fixed place of business may he operate under §205.46 only. Any junk dealer who maintains a place where persons may come for the sale or purchase of junk, other than a movable vehicle, would be operating a permanent place of business.

We have not overlooked the provision appearing in §7, Ch. 22858, 1945, which purports to amend §205.47, F. S., by deleting therefrom "dealing in junk, except traveling junk dealers." If this amendment is to be given full force and effect it will result in the repeal of the section, but is limited to the exception then the question arises as to whether the repeal of §205.46 was intended. If the repeal of §205.46 was not intended, then no effective change in the statutes was made unless the repeal of §205.47 was intended. We do not think that the legislature intended to make any change in the statutes, although they may have intended to delete the phrase "except traveling junk dealers."

Answering the above question, where a person operates a junk business from a movable vehicle, without any junk yard or other headquarters or place of business where persons may go to sell or to purchase junk materials, then he is only required to obtain a license under §205.46, otherwise he is required to obtain a license under both sections. The material question is whether one or more than one place of business is operated. This can be determined only from the applicable facts and circumstances in each particular case.

057-55—March 1, 1957

STATE AND COUNTY OFFICERS & EMPLOYEES

RETIREMENT—FORMER ST. PETERSBURG PORT AUTHORITY—CHS. 20120, 21561, 21562, 22464 AND 26163, 1939, 1941, 1943 AND 1949, §§122.01 AND 122.02, F. S. AND FORMER CHS. 121 AND 134, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

May a present state employee and member of the state and county officers and employees retirement system receive credit for the time served by him as an employee of the "St. Petersburg port authority" prior to state employment?

The session laws of this state reveal that a port district known as the St. Petersburg port district was established by Ch. 20120, 1939, presided over by an agency known as the "St. Petersburg port authority," a body politic and corporate. However, by Ch. 22464, 1943, this port district was reestablished and revised, evidently extending the territorial limits of the said district. This port district was presided over by a port authority of the same name composed of five members selected and appointed by the city manager of the city of St. Petersburg and approved by the city council of said city. This authority was designated by the said act as "a body politic and a body corporate." It was the design and plan that this authority undertake the construction of a bridge across lower Tampa bay; however, pending the construction of the bridge, the authority expended money for the acquisition of ferries with which to transport, temporarily, traffic and persons across said Tampa bay (State v. Florida State Improvement Commission, Fla., 52 So. 2d 277).

We gather from Chs. 20120, 21561, 21562, 22464 and 26163, 1939, 1941, 1943 and 1949, that the port authority was an entity separate and apart from the city of St. Petersburg, although the municipal corporation was vitally interested in the district and its operations. Port districts have been said to be quasi-municipal or municipal corporations (27 Words and Phrases 774-5), as have also hospital, drainage, irrigation, road and bridge, and other types of districts (27 Words and Phrases 750-784). The Everglades drainage district was, in Forbes Pioneer Boat Line v. Board of Commissioners, 77 Fla. 742, 82 So. 350, held to be a quasi-public corporation, and as such an agency of the state for a particular purpose. In Duval County v. Charleston Lumber and Manufacturing Co., 45 Fla. 256, 33 So. 531, text 532, counties were held to be municipal corporations in the broad meaning of the term. The term "municipalities," as used in §8, Art. VIII, of the state constitution, refers to the limited or narrower use of the term and does not extend to road and bridges districts (Cone v. Massey, 137 Fla. 417, 189 So. 44) or counties (State v. Crandon, 105 Fla. 309, 141 So. 177) and the like.

We doubt that employees of the "St. Petersburg port authority" would be within the definition of "state and county officers and employees" contained in §122.02, F. S., or within Ch. 122, F. S., in the light of said definition. However, rights of persons under prior state and county retirement systems (Chs. 121 and 134, F. S.), are by §122.01, F. S., preserved to former members of said systems. It was provided in former §121.03, F. S., that "whenver the administrative functions of a department of a *municipality* or county of this state has heretofore or shall hereafter be assumed by any state board or agency and the salaries of its officers and employees shall thereafter be *paid with vouchers drawn on the state treasurer* such officers and employees shall be entitled to participate in the state officers and employees retirement law and receive credit when such department was operated by such municipality" We understand that employees of the Florida state improvement commission, in its operation of the ferries in question did not pay its employees in that connection with vouchers drawn on the state treasurer.

We think that the above question should be answered in the

negative, *first*, the port district was not a municipality within the purview of §121.03, and *second*, the Florida state improvement commission, after taking over the properties of the district and operation of the ferries, did not pay its employees with vouchers drawn on the state treasurer.

057-56—March 4, 1957

**REGULATION OF PROFESSIONS AND VOCATIONS
VETERINARIANS — REQUIREMENTS FOR PRACTICE IN
FLORIDA—§§474.02, 474.04 AND 474.07, F. S.**

To: Dr. C. E. Dee, President, State Board of Veterinary Examiners, Hollywood

QUESTION:

May a person who is a graduate of a veterinary college recognized by the American veterinary medical association practice veterinary medicine and surgery in Florida for one or more livestock owners on a salary arrangement without first qualifying with the Florida state board of veterinary examiners?

Section 474.07, F. S., defines the practice of veterinary medicine and surgery as follows:

Any person shall be regarded as practicing veterinary medicine and surgery within the meaning of this chapter who professes publicly to be a veterinary surgeon, doctor or dentist, or who appends to his name any initials by prefix, or affix, or title implying qualifications to practice the same, or who shall operate on, or prescribe for, or administer any medicine, or any biologic preparation to, either as a cure or preventive for any disease, or who shall treat any physical ailment in, or any physical injury to, or deformity of, any animal, and who shall charge or receive therefor money or other compensation of any kind or character, directly or indirectly.
...."

No one may practice veterinary medicine and surgery in this state before passing an examination conducted by the state board of veterinary examiners. (§474.02, F. S.)

One of the requirements a person must meet to become eligible to take the examination to qualify to practice veterinary medicine and surgery in Florida is to be a graduate of a veterinary college recognized by the American veterinary medical association. (§474.04, F. S.) However, a graduate of such a college is in no way qualified to practice veterinary medicine and surgery until he applies for, takes and passes the examination required in §474.02, F. S.

The fact that a person is employed by one or more livestock owners on a salary arrangement does not exempt him from qualifying with the state board of veterinary examiners before entering upon the practice of veterinary medicine and surgery.

The provisions of the statutes require that your question be answered in the negative.

057-57—March 4, 1957

INSURANCE

OASI—NECESSITY FOR LEGISLATION TO IMPLEMENT AMENDMENTS FOR FEDERAL SOCIAL SECURITY

To: Herbert W. Miller, Assistant Director of OASI, Tallahassee

QUESTION:

Section 218(d) of the federal social security act (42 U. S. C. A. 418) was amended in 1956 to allow named states, including Florida, several new types of OASI coverage, described below. Do all or any of such new types of coverage require enabling legislation before they can be put into effect in Florida?

The mentioned amendments, or so much thereof as seems required, are quoted:

For the purposes of this subsection any retirement system established by the State of Florida (and other named states and territory) and any political subdivision of any such State or Territory . . . which, on, before, or after August 1, 1956 is divided into two divisions or parts, one of which is composed of positions of members of such system who desire coverage under an agreement under this section and the other of which is composed of positions of members of such system who do not desire such coverage, shall, *if the State, or Territory so desires* and if it is provided that there shall be included in such division or part composed of members desiring such coverage the positions of individuals who become members of such system after such coverage is extended, be deemed to be a separate retirement system with respect to each such division or part (42 U. S. C. A. 418(d) (6).)

For the purpose of this subsection, in the case of any retirement system of the State of Florida (and other named states and territory) which covers positions of employees of such State or Territory who are compensated in whole or in part from grants made to such State or Territory under sub-chapter III of this chapter, there shall be deemed to be, *if such State or Territory so desires*, a separate retirement system with respect to any of the following: . . . (42 U. S. C. A. 418(d) (6)).

Any agreement with the State of Florida (and other named states) entered into pursuant to this section prior to August 1, 1956 may, notwithstanding the provisions of subsection (d) (5) (A) of this section and the references thereto in subsections (d) (1) and (d) (3) of this section, be modified pursuant to subsection (c) (4) of this section to apply to service performed by employees of such State or any political subdivision thereof in any policeman's or fireman's position covered by a retirement system in effect on or after August 1, 1956, but only upon compliance with the requirements of subsection (d) (3) of this section. For the purposes of the preceding sentence, a retirement system which covers positions of policemen or firemen, or both, and other positions shall, *if the State concerned so desires*, be deemed to be a separate retirement system with

respect to the positions of such policemen or firemen, or both, as the case may be. (42 U. S. C. A. 418 (p).)

Notwithstanding the provisions of subsection (d) of section 218 of the Social Security Act, any agreement under such section entered into prior to the date of enactment of this Act by the State of Florida (and other named states and territory), shall *if the State or Territory concerned so requests*, be modified prior to July 1, 1957, so as to apply to services performed by employees of the respective public school districts of such State or Territory who, on the date such agreement is made applicable to such services, are not in positions the incumbents of which are required by State or Territorial law or regulation to have valid State or Territorial teachers' or administrators' certificates in order to receive pay for their services. The provisions of this subsection shall not apply to services of any such employees to which any such agreement applies without regard to this subsection. (42 U. S. C. A. 418; §218(f), Social Security Act.)

The italicized wording in each of the above provisions to the effect "if the State so desires" or, "if the State so requests," reasonably requires an expression with respect to the subject matter by the state. It may be that legislation may not be needed to express such desire or make such request. However, to remove all doubt, I am of the opinion that the position should be assumed that in these instances the state can express itself only through the legislature. Hence I recommend that if provisions contemplated by the above amendments are desired for Florida, specific legislation covering such be prepared and submitted to the 1957 regular legislative session.

057-58—March 4, 1957

INSURANCE

OASI—STATUS OF VARIOUS COUNTY HOSPITALS AND INSTITUTIONS OF HIGHER LEARNING—§§650.02(6) AND CH. 155, F. S., CHS. 20053, 1939; 24415, 1947; 26040 AND 26468, 1949; 27413, 27438 AND 27746, 1951

To: Herbert W. Miller, Assistant Director of OASI, Tallahassee

QUESTIONS:

1. For OASI referendum purposes, are the county hospitals named below political subdivisions in the respective counties where same are located?

2. For like purposes, are the university of Florida, Florida state university, Florida A. & M. university, and junior colleges, political subdivisions of the state or, as to such junior colleges, of the respective counties where located?

AS TO QUESTION 1:

In our opinion 056-351, dated Dec. 19, 1956, directed to the above assistant director of OASI we dealt with the question of the nature of a county school board in relation to county government. On the basis of the definition of "political subdivision" in 42 U. S. C. A., §418, definition of the same words in §650.02(6), F. S., and the remarks of our court in the case of First National Bank

v. Board of Public Instruction, Fla., 111 So. 523, we found that such a county school board was a corporate "juristic entity," an "instrumentality" of the county within said definitions and, hence, under such definitions was a "political subdivision" for OASI purposes.

The general law relating to county hospitals is set forth in Ch. 155, F. S. Attention is directed to the provisions of such chapter. A casual reading will demonstrate that such a hospital is governed by a board of trustees appointed by the governor, which board is charged with receipt and disbursement of moneys in connection therewith; and that for the same reasons set forth in above opinion 056-351, under the mentioned definitions, such a hospital is a "juristic entity," an "instrumentality" of the county and, hence, a political subdivision of the county.

With respect to each county hospital named, we have endeavored to locate and consider quite a number of local bills pertaining thereto. This research is available for any interested person. It is sufficient here to state that where it appears from the records of the secretary of state's office that as to a given county hospital it is evidenced that trustees have been appointed by the governor under provisions of Ch. 155, that such hospital operates within the provisions of said chapter. Further, where by special act a hospital is created and functions under its provisions, which places control of management, money and employees under a governing body appointed by the governor, separate and distinct from the county wherein located, by like reasoning such is a "political subdivision" for OASI purposes.

Investigation has developed the fact that the following county hospitals are governed by trustees appointed by the governor under provisions of Ch. 155 and, hence, are to be considered "political subdivisions" of the respective counties wherein the same are located, within the meaning of the mentioned definitions: Alachua general hospital; memorial hospital (Bay county); Escambia general hospital; Louisiana Raulerson hospital (Okeechobee); and Walton county hospital.

The following hospitals are operating under special acts but, by reason of management, control and nature, are "political subdivisions" within said definitions: Bradford county hospital corporation (Ch. 27413, Laws of 1951); North Broward hospital district (Ch. 27438, Laws of 1951); South Broward hospital district (Ch. 24415, Laws of 1947); Lake Shore hospital corporation (Ch. 30264, Laws of 1955; Sarasota county public hospital board (Ch. 26468, Special Session, 1949).

The following hospitals are under the control of the boards of county commissioners in the respective counties wherein located and, hence, are departments and not political subdivisions of their respective counties: Monroe general hospital (Ch. 26040, Laws of 1949; Ch. 27746, Laws of 1951; Ch. 31015, Laws of 1955); and Jackson memorial hospital, Dade City (Ch. 20053, Laws of 1939; Ch. 29403, Laws of 1953).

No determination has been made concerning Duval medical center and Mahatee veterans memorial hospital.

AS TO QUESTION 2:

Turning now to the 2nd question, it would appear that the answer is found in the provisions of the federal social security act (42 U. S. C. A. 418(d)(6)):

If a retirement system covers positions of employees of one or more political subdivisions of the state or covers positions of employees of two or more political subdivisions of the State, there shall, if the State so desires, be deemed to be a separate retirement system with respect to any one or more of the political subdivisions concerned, and, where the retirement system covers positions of employees of the State, a separate retirement system with respect to the State and any one or more of the political subdivisions concerned. *If a retirement system covers positions of employees of one or more institutions of higher learning, then, for purposes of such preceding paragraphs, there shall, if the State so desires, be deemed to be a separate retirement system for the employees of each such institution of higher learning. For the purposes of this paragraph, the term "institutions of higher learning" includes junior colleges and teachers' colleges. (Emphasis supplied.)*

Thus, for OASI purposes, it is immaterial whether the named Florida institutions are "departments" or "political subdivisions"; the federal social security law has dealt with them with particularity and prescribed conditions which must be met for OASI purposes.

057-59—March 5, 1957

TAXATION

TAXES ON LIQUORS AND OTHER ALCOHOLIC BEVERAGES SOLD TO CUSTOMERS IN OTHER STATES—§561.49 AND CHS. 561 AND 562, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Where liquors and beverages, within the purview of Chs. 561 and 562, F. S., are sold by distributors or manufacturers in this state, to customers in other states, what taxes, if any, should be collected by the state beverage department on such sales?

Section 561.49, F. S., provides, in so far as is here material, that "the excise taxes provided for in this chapter (i.e., Ch. 561, F. S.) shall be paid as to all beverages sold within this state. No excise taxes shall be required to be paid by manufacturers or distributors as to the sale of beverages *which are actually delivered* by such manufacturer or distributor to persons outside of the state in places where the sale of such beverages is authorized by law The burden shall always be on the manufacturer or distributor to show to the satisfaction of the director by bill of lading of a common carrier or other satisfactory evidence that delivery was made outside the state in accordance with the laws of the place of delivery." (Emphasis supplied.) It seems clear from the above statute that the burden of showing that *the beverages were actually delivered*, by the manufacturer or distributor, to persons outside of the state, is upon the person who claims exemption under said §561.49, F. S. Until this fact is shown, the department should consider the beverages subject to excise taxes under the laws of Florida.

Where delivery is made by a common carrier, the place of

shipment is ordinarily the place of delivery, unless the sales contract provides, or by its terms shows an intention, that delivery is to be elsewhere (77 C. J. S. 859-60, §143). Where the agreement is to sell goods free on board (F.O.B.) a designated place, such place will ordinarily be regarded as the place of delivery, where no intention to the contrary appears (77 C. J. S. 860, §143). In the absence of an agreement to the contrary, the presumption is that delivery is to be at the place of sale (77 C. J. S. 861, §145). The intent and purpose of §561.49, F. S., appear to have been to tax sales in Florida and exempt sales made in other states. Where a person residing in one place orders goods subject to acceptance of the order in another place, and such order is there accepted, the place of acceptance and not the place of the order is the place of the contract (McLendon v. Lurton-Hardaker Co., 83 Fla. 263, 91 So. 113, text 115; Nettles v. Gulf Fertilizer Co., 78 Fla. 490, 83 So. 298, text 299). The last act necessary to complete the sale is usually the place of the contract or sale (Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313, text 316).

It appears from the file before us orders for liquors and beverages for officers and non-commissioned officers' messes and clubs in Fort Rucker, Alabama, a military establishment of the U. S., are sent or brought from Fort Rucker to Pensacola by mail or in person, where the orders are accepted and filled and shipped by common carrier under seal to the purchaser in Fort Rucker. Some of these orders indicate that purchases are made F.O.B. Pensacola, others do not so indicate. We also have before us a bill of lading, issued by a common carrier, for the transportation of liquors and beverages from the distributor in Pensacola to Fort Rucker, from which it appears that the goods were shipped carriage charges collect. We find a statement in the letter, of Feb. 6, 1957, from a district auditor to the director, that "the merchandise is owned by the officers' open Mess," from the time delivered to the common carrier and sealed.

Where liquors and beverages, within the purview of Chs. 561 and 562, F. S., are sold by distributors and manufacturers in this state, to customers in other states, excise taxes are due where the sale is a Florida contract and delivery is made in this state, which may be to a common carrier as agent for the purchaser, but not due where delivery is made, and the contract of sale is one, in another state. The question of place of contract and place of delivery is largely one of fact. Although the presumption is that the sale and delivery was made in this state and nothing appears from the application for a refund or from the file to overcome this presumption, we would suggest that the application for refund be rejected without prejudice to file an amended petition if desired to meet the requirements of the statutes and this opinion if the unrevealed facts so justify.

057-60—March 5, 1957

CRIMES

GAMBLING—CONDUCT OF LOTTERIES

To: *Richard H. Cooper, County Solicitor, Orlando*

QUESTION:

During baseball broadcasts and telecasts, a sponsor will make five phone calls to people whose names are

picked from the phone directory, and if the person called answers the phone, "Hello, Mr. Boh," said person will win the jackpot. On the first call, the jackpot will be \$10 and \$5 is added each time the person called fails to answer "Hello, Mr. Boh." In the event the person called does not win the jackpot, he is sent a carton of the sponsor's beer glasses. Is such a scheme a lottery?

There are three elements in a lottery, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

It is apparent that the elements of a prize and an award by chance are present in the described promotion. As to the elements of consideration, it appears from your correspondence the term "Mr. Boh" appears on the Florida registration of trademark of the sponsor. This factor of the scheme when advertised to the public as well as the giving of glasses with the sponsor's names to those who fail to win the jackpot appears to supply ample consideration which flows to the sponsor. The benefits which flow to the sponsor together with the time and efforts of participants to acquire the knowledge of the scheme, listening to the program and advertising, and the efforts to go to the telephone to answer a named sponsor's questions would apparently constitute a consideration for the chance to win a prize. Moreover, all prospective participants are subjected to the sales appeal of the sponsor's product, and the sponsor's purpose is to achieve a financial profit from the scheme and not simply to become a public benefactor. The benefit to the sponsor from the public good will must be recognized also, since the general acceptability of his product is made known through the widespread radio and television advertising promotion of the scheme.

It would appear that all the necessary elements of a lottery appear in the proposed scheme sufficient to make it a violation of the law.

057-61—March 5, 1957

CRIMES

WEAPONS AND FIREARMS—DISCHARGE IN PUBLIC— §790.15, F. S.

To: *Thomas J. Rivers, County Judge, Green Cove Springs*

QUESTION:

Does §790.15, F. S. prohibit the discharge of firearms on public highways although such discharge does not take place within 300 yards of any premises?

It appears to us that the language of the statute is in the disjunctive and prohibits two offenses. The first makes it unlawful to discharge any firearms on any public highway. It next makes it unlawful to discharge any firearms in any unincorporated village within 300 yards of any premises therein without permission from the occupant or occupants.

Both offenses are subject, however, to the qualification that firearms may be discharged in defense of life, limb or property.

The question is answered in the affirmative.

057-62—March 6, 1957

TAXATION**INTANGIBLE PERSONAL PROPERTY TAXES—RETIREMENT AND BENEFIT TRUST FUNDS—§199.02(5), F. S.***To: Ray E. Green, Comptroller, Tallahassee***QUESTION:**

Are funds held in trust for the use and benefit of retirement and benefit plans for officers and employees of a corporate or private industrial establishment entitled to exemption from taxation under Ch. 199, F. S.?

"Intangible personal property belonging to the state, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." (§199.02(5), F. S.). Unless expressly exempted from taxation all real and personal property in this state is subject to taxation in the manner provided by law (§192.01, F. S.; §1, Art. IX, and §16, Art. XVI, state constitution; *Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608; *West Virginia Hotel Corp. v. W. G. Foster Co.*, 101 Fla. 1147, 132 So. 842, text 846; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232, text 237). The law conclusively presumes "that every property owner, not affirmatively shown to be exempt, is due some amount of taxes on his holdings for every tax year" (*DeVane v. Leatherman*, 113 Fla. 216, 151 So. 530, text 531). "This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted" from taxation by statute or the constitution. (*Bancroft Investment Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 170).

The intangible personal property mentioned in the above stated question does not appear to be within the purview of said §199.02, (5), F. S., and we find no other statute or constitutional provision which appears to grant tax exemption to such property. The above question is, therefore, answered in the negative.

057-63—March 11, 1957

TAXATION**INTANGIBLE PERSONAL PROPERTY TAXES—BROADWAY PLAN OF CHURCH FINANCING—§§199.02, 199.11 AND 697.01, F. S.***To: Ray E. Green, Comptroller, Tallahassee***QUESTION:**

Are the so-called certified bond resolutions, issued in connection with the administration of the so-called Broadway plan of church financing, mortgages, deeds of trust or other liens, within the purview of subsections (3) of §§199.02 and 199.11, F. S.?

Class "C" intangible personal property is defined by §199.02 (3), F. S., as "being all notes, bonds and other obligations . . . for payment of money which are secured by mortgage, deed of trust or other liens upon real property situated in Florida . . ." It is made to appear from the confirmed copy of the certified bond resolution before us that the church "desires to issue a series of

building bonds bearing interest at the rate of 5% per annum" payable as therein stipulated. Section IV of the said resolution seems to describe the real estate upon which the church buildings are located; however, §V of the said resolution recites that the said resolution "is not intended as a mortgage; however, the church binds and obligates itself, its successors and assigns, that the above property will not be sold or in any manner encumbered while the bonds . . . are outstanding . . . unless the purchaser or mortgagee thereof shall pay all outstanding and unpaid bonds together with interest thereon." The church is obligated to keep the buildings insured and in case of loss the proceeds are made a trust fund for the repair of the property or the payment of outstanding bonds.

The resolution further provides that there is "assigned, set aside and appropriated out of the first weekly revenues of the church, each week, the sum of \$120" while the bonds are outstanding and unpaid. The attorney general of Alabama, on March 5, 1954, held a similar resolution not to be a mortgage, deed of trust, or other instrument of like character. A similar ruling was made by the state tax commission of New York, on Oct. 21, 1955, evidently based upon an opinion of the attorney general of New York of June 28, 1927. In Florida "all conveyances, obligations, conditional or defeasible, bill of sale, or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money . . . shall be deemed and held mortgages" (§697.01, F. S.).

Although the resolution in question contains a covenant not to mortgage or place liens against the church property so long as the bonded debt remains unpaid, which would have the effect of preserving the property so that it might be subject to execution should a judgment be obtained on delinquent bonds, we find nothing in the said resolution that would seem to make it a mortgage within the purview of said §697.01, F. S. This being true, the bonds in question are not taxable under the provisions of subsections (3) of §§199.02 and 199.11, F. S., and the above question is answered in the negative. We here hold only that the bonds are not subject to taxation as class "C" intangible personal property, and do not hold that they are not subject to taxation under some other classification.

057-64—March 12, 1957

LABOR

WORKMEN'S COMPENSATION LAW—PROVISIONS OF ACT IN RELATION TO EMPLOYER WHO DOES NOT REJECT THE ACT—§§440.04-440.08, AND 440.43, F. S.

To: *W. F. Anderson, County Judge, Bronson*

QUESTION:

Is an employer, within the provisions of Ch. 440, F. S., who accepts such chapter, but whose employees elect not to operate under such chapter, required to secure the payment of compensation as prescribed in the chapter?

The workmen's compensation law (Ch. 440, F. S.) among other things provides that if an employer required to secure pay-

ment of compensation fails to secure such compensation, upon conviction shall be guilty of a misdemeanor with penalties as provided (§440.43, F. S.). The request for opinion refers to "some violations of Ch. 440, F. S." Since administration of said law is charged to the workmen's compensation division of Florida industrial commission, under ordinary circumstances we would refrain from construing any provision of said law in absence of a request from the commission. However, we construe the request for opinion as deriving from duties of the above county judge in relation to his official duties; hence, that he is entitled to advice.

Section 440.04, F. S., refers to waiver of exemption; §440.05, F. S., prescribes notice of nonacceptance of the chapter by an employer and waiver of exemption. Section 440.06, F. S., deals with the effect of an employer electing not to operate under the chapter. Section 440.07, F. S., deals with the effect of an employee electing not to operate under the chapter, and §440.08, F. S., sets forth the effect of rejection of the chapter by both employer and employee.

We are here dealing with a police regulation and statutory procedures. The chapter provides in detail the manner in which an employer may elect to reject the act and notice to be given concerning that election. That is the only manner provided for rejection of the chapter by an employer. Hence, the fact that employees may reject the act has nothing to do with the duty of an employer under the act to secure payment of compensation.

For the above reasons, the question is answered in the affirmative.

057-65—March 12, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
EXCHANGE OF SECURITIES BY STOCKHOLDERS OF ISSU-
ING CORPORATION—§517.06(4), (9), F. S.**

To: *C. Wilson Cogswell, Director, Florida Securities Commission,
Tallahassee*

QUESTION:

Is registration required, of either or both types of securities, where a corporation issues one type (first type) of security to its stockholders convertible, at the election of the stockholders and within a time certain, into another type (second type) of security issued by the corporation?

Under §517.06(4), F. S., the "issuance of additional securities of a corporation sold or distributed by it among its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such additional securities," is exempted from the operation of the statutes of this state regulating the sale of securities. Where no commission or other remuneration is paid or given in connection with the distribution of the first type of securities mentioned in the above question, no registration would seem to be necessary. But if such a commission or other remuneration was paid, or the said first type of securities is sold to other than stockholders, registration would seem to be required. This brings us to the question as to the second class of securities

mentioned in the question or the securities to be issued in exchange for the first type.

Where a security is issued subject to exchange for or conversion into another type of security of the same issuer §517.06(9), F. S., becomes material, in so far as it provides that where the security to be given in exchange or converted into the second type of security had been registered under the law when sold or was at such time or was exempt from the provisions of the law, and "the security issued and delivered in exchange (the second type), if sold at the conversion price, would at the time of such conversion fall within the class of securities entitled to registration by notification under the law." The par value of the security given in exchange (the first type) is deemed to be the price at which the securities issued and delivered in such exchange (the second type) are sold for the purpose of determining whether it may be entitled to registration by notification. The date of the exchange and not the date of the issuance of the first type of securities is the date as of which its right to registration by notification is to be determined.

Where the first type of securities is issued under the exemption contained in §517.06(4), F. S., and the second type of securities would be subject to registration by notification on the date of exchange (based on the par value of the first type of securities), the above question is answered in the affirmative; however, where the first type is not within the exemption of §517.06(4), F. S., or the second type is not subject to registration by notification as above on the date of exchange, the question is answered in the negative.

This seems to place the burden upon the issuer to be certain that the second type of securities is actually entitled to registration by notification upon the date of the exchange for the first type. Should an error be made in this connection, there will be a violation of the securities statutes by the issuer or its agent making the exchange for it. The question is such that it may not be determined prior to the date of exchange.

057-66—March 14, 1957

TAXATION

USE AND SALES TAXES—USE OF CERTAIN TYPES CLOTH;
POLES, ETC.—EXEMPTION—§212.08(6), F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Is the purchase or use of saran polyethylene cloth, poles, etc., used in connection with the production of pompon chrysanthemums in this state, along with similar items needed in the production of floral crops in the state, exempt from Florida's sales and use taxes?

Not being advised from the file before us, we shall presume that the cloth, poles, etc., in question are used in connection with the production of chrysanthemums and other types of flowers and flowering plants either for the purpose of producing needed shade or as a protection against insects and other things, similar to the use of cheesecloth in connection with the protection of certain types of tobacco beds and fields. Subsection (6) of §212.08, F. S., provides exemption from use and sales taxes, under Ch. 212, F. S., of "cheese-

cloth for shading tobacco and tobacco beds, machines and equipment used in plowing, planting, cultivating and harvesting crops. . . ."

The production of gladiolus and gladiolus bulbs (*Florida Gladiolus Growers Ass'n v. U. S. DC Fla.*, 106 Fed. Supp. 525), Tobacco (*I. C. C. v. Yearly Transfer Co.*, D. C., Ky. 104 Fed Supp. 245), peanuts (*Fleming v. Farm Peanut Co.*, DC Ga., 37 Fed Supp. 628), fruits (3 Words and Phrases, 64 et seq.), pine tree gum (*U. S. v. Turner Turpentine Co.*, CCA 5th, 11 F. 2d 400); flowers and plants in greenhouses (*Gwin v. J. W. Vestal & Son*, 205 Ark. 742, 170 S. W. 2d 598; *Henry A. Dreer, Inc. v. Unemployment Compensation Comm.*, 127 N. J. L. 149, 21 A. 2d 690), sugar cane farming (*Vives v. Serralles*, CCA Puerto Rico, 145 Fed. 2d 552), and nurseries (*Hill v. Georgia Casualty Co.*, Tex., 45 S. W. 2d 566) have been held to be agricultural in their nature. The products of nurseries and greenhouses have been held to be "agricultural products" (*State v. Wertheimer*, 253 Ala. 124, 43 So. 2d 824). "Agricultural products" in its broad sense includes farm, horticultural and forestry products (*Northern Cedar Co. v. French*, 131 Wash. 394, 230 P. 837; *Forsythe v. Village of Cooksville*, 356 Ill. 289, 190 N. E. 421). See also definition of "farm product" in 35 C. J. S. 750. There seems to be a conflict of authority of whether the growing of bulbs, flowers, and greenhouse plants commercially is farming, the line of demarcation being uncertain in some cases. Crops have been defined as the products of the soil grown and raised annually and gathered in a single season (25 C.J.S. 1, §1), and have been held to include plants, shrubs and flowers grown by a florist (25 C.J.S. 3, §1, note 7).

It seems to me that the raising of chrysanthemums and other flowers might well be classed as the production of agricultural products and in the nature of crops, if not crops, and that the use of cloth and other products for shade and for protection from insects, etc., is within the purview of cultivating such crops (25 C.J.S. 24 and 25), §212.08(6) F. S.

We, therefore, feel that the above question should be answered in the affirmative and that the cloth and poles, etc., in question are exempt from sales and use taxes.

057-67—March 13, 1957

LABOR

UNEMPLOYMENT COMPENSATION LAW—BOND OF STATE
TREASURER IN RELATION TO UNEMPLOYMENT
COMPENSATION FUNDS FOR VETERANS AND
FEDERAL EMPLOYEES—§§18.01, 18.02, 216.20,
216.23(4), 443.10, F. S. AND §24, ART. IV,
STATE CONST.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

Does the general bond covering the state treasurer protect the unemployment compensation fund for veterans and the unemployment compensation fund for federal employees?

The first paragraph of the request for opinion is quoted:
For some months now we have been exchanging corres-

pondence with the Bureau of Employment Security and the U. S. Department of Labor and The Travelers Indemnity Company, trying to arrive at a decision as to whether the general bond of the State Treasurer covers the handling in the State Treasurer's office of the unemployment compensation funds for veterans and the unemployment compensation funds for federal employees. Both of the latter funds are federal funds which are made available to the Unemployment Compensation Division of the Industrial Commission for payment on a week-to-week basis to claimants therefor who establish eligibility under the applicable federal laws for the same. Florida (as well as other states) acts as agent for the Federal Government for payment of these weekly benefits for unemployment to eligible workers.

Section 18.01, F. S., begins with the wording: "The state treasurer shall, within ten days before he enters upon the duties of his office, give a bond to the state, in the sum of one hundred thousand dollars ... conditioned that he will faithfully execute the duties of his office. ..." Omitting material relevant but unnecessary to quote here, it is noted that the last sentence in the section provides: "Such bond shall be deemed to extend to the faithful execution of the office of treasurer by the person giving such bond until his successor shall have qualified, and to the faithful performance of the duties of treasurer of each board or fund of which he is or may be made by law ex officio the treasurer."

Section 24, Art. IV, Fla. Const., provides: "The Treasurer shall receive and keep all funds ... in such manner as may be described by law, and shall disburse no funds ... except upon the order of the Comptroller, countersigned by the Governor, in such manner as shall be prescribed by law."

Section 18.02, F.S., is quoted: "The treasurer shall pay all warrants on the treasury drawn by the comptroller and countersigned by the governor, and no moneys shall be paid out of the treasury except on such warrant."

Section 443.10, F.S., establishes as a special fund an unemployment compensation fund, deriving from the following sources: all contributions collected under Ch. 443, property or securities acquired through use of moneys belonging to the fund, and all earnings of such property or securities; that the state treasurer shall be the ex officio treasurer and custodian of the fund, and that he shall maintain in the fund three separate accounts: a clearing account, an unemployment trust fund account and a benefit account; that each of such accounts and the duty of the treasurer in relation thereto is detailed; and that the treasurer shall be liable on his official bond for the faithful performance of his duties as custodian of the fund. The commission, of course, administers such fund.

At this point it is well to observe that if the provisions of Ch. 443 did not specifically provide for the custodianship of the unemployment compensation fund and the manner of its disbursement, that custodianship and manner of disbursement would be as provided in §443.10.

The benefits contemplated by the question involve federal funds for the payment of benefits to eligible workers in the classes mentioned, through the state (Florida industrial commission) acting as agent for the government. No particular federal or state statutes

control with respect to custodianship and method of disbursement of such funds. By reason of the above-mentioned constitutional and statutory provisions, properly such moneys are placed in the state treasury and disbursed therefrom in accordance with such provisions. In further support, see §§216.20 and 216.23(4), F. S.

It is to be observed that the question is not one dealing with the coverage of the bond of the state treasurer; the question is whether the funds are properly in the custodianship of that official. For it is obvious that if the funds properly should not be in the state treasury, the state treasurer would be without authority to accept them and if he did would do so not as state treasurer but in his individual capacity.

Since it appears that properly such funds are in the custodianship of the state treasurer, they are within the protection and coverage of his general bond. Hence, the question is answered in the affirmative.

057-68—March 13, 1957

EDUCATION

HEARINGS BEFORE BOARDS OF PUBLIC INSTRUCTION RELATING TO SUSPENSION AND DISMISSAL OF TEACHERS—WITNESSES, EVIDENCE—

§230.23(5)(i)

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. Does the board of public instruction have the power to compel attendance of witnesses at a hearing to determine whether or not a teacher should be dismissed and discharged on the grounds of insubordination as provided by §230.23(5)(i), F. S.? If so, how is this power exercised?

2. Does the board of public instruction have the power to require witnesses to take oaths to testify at such a hearing? If so, who should administer the oath?

3. Does the board of public instruction have the power to place witnesses under the rule?

4. Are the same rules as to the admissibility of evidence applicable to such a hearing as are prescribed for trial before a court?

AS TO QUESTION 1:

I know of no authority by which a county school board may compel attendance of witnesses at its hearings. This question is answered in the negative.

AS TO QUESTION 2:

The county school board has no authority to require witnesses to testify under oath. If they are willing to do so voluntarily, the oath may be administered by a notary public. Subject to the above comment, this question is answered in the negative.

AS TO QUESTION 3:

The board has authority to adopt reasonable rules and regulations for the conduct of its hearings. In my opinion, it is authorized to place witnesses who are not interested parties under the rule if it is considered necessary to preserve the integrity of the testimony. (See 74 C.J.S., §127, p. 450.)

This question is answered in the affirmative.

AS TO QUESTION 4:

A county school board is an administrative organization and not a judicial body.

The board itself may adopt reasonable policies and procedures as to the manner in which the hearing will be conducted and as to the presentation of testimony and evidence. Administrative boards as a rule follow generally established principles relating to the admissibility of evidence so that orderly proceedings may be carried out which are not prejudicial to the interested parties. Adherence to strict rules of evidence is usually impracticable, however, and unnecessary, in view of the relatively informal nature of the proceedings and the fact that interested parties to such proceedings are frequently not represented by attorneys. (See 73 C.J.S. §125, p. 445 and § 127, p. 450.) Subject to the above comment, this question is answered in the negative.

057-69—March 13, 1957

STATE OFFICERS AND EMPLOYEES

REQUISITIONS FOR SALARY OF OFFICERS AND EMPLOYEES OF THE STATE—SIGNATURE—§§23, 24, ART. IV, §4, ART. IX, AND §3, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are requisitions for salaries of state officers and employees required by the state constitution or statutes, and if so, are they required to be personally signed by the said officer or employee before salary may be paid?

The state comptroller is required to pre-audit all claims against the state before payment (§23, Art. IV, State Const.), and state funds may be disbursed only upon warrant issued by the state comptroller and countersigned by the governor (§24, Art. IV, State Const.), pursuant to appropriations made according to law (§4, Art. IX, State Const.). "The salary of every officer shall be payable monthly upon his own requisition" (§3, Art. XVI, State Const.). We find no statute specifically setting out what proof of accounts and claims are to be required by the state comptroller when pre-auditing and allowing claim accounts against the state; this being true, the nature and extent of proof of such claims and accounts are left largely to the discretion of the state comptroller, except that he must require that state officers make specific requisition for their salary. The term "officer" does not usually embrace an "employee" (State v. Sheats, 78 Fla. 583, 83 So. 508, text 509; Palmer et al. v. State ex rel. Axleroad, 149 Fla. 616, 6 So. 2d 550, text 551-2). The term "officer" used in §3, Art. XVI, State Const., does not seem to extend to and constitutionally require state employees to file requisitions for their salaries, as is required of state officers.

The state constitution clearly contemplates that the salaries of state officers be paid upon requisition signed by them in person or by duly authorized attorneys in fact; however, there is no like constitutional requirement for state employees. It seems to be within the power and authority of the state comptroller to determine what evidence shall be required of state employees for the payment

of their salaries. He may in his discretion require state employees to file requisitions for their salaries in the same manner as officers are required to file requisitions by the state constitution, or he may adopt other requirements satisfactory to him. He may in his discretion accept requisitions signed by the heads of departments in behalf of the employees working under such head of a department. He may fix other reasonable requirements satisfactory to him.

These observations seem to answer the above stated question.

057-70—March 13, 1957

TAXATION

HOMESTEAD TAX EXEMPTION—CLAIM OF WIFE OF CITIZEN OF SOUTH AMERICA—§7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a citizen and resident of Florida, who is married to a national of another country traveling between the U. S. and that country on a commercial visa, owns real property in this state and resides thereon and makes it her home, is she entitled to homestead tax exemption?

A property owner who in good faith makes real property in this state his permanent home is entitled to homestead tax exemption, notwithstanding he is not a citizen of the U. S. or of this state (*Smith v. Voight*, 158 Fla. 366, 28 So. 2d 426). "Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to" homestead tax exemption (§7, Art. X, State Const.). In *Hoffman v. Drennen*, Fla., 88 So. 2d 624, Martha Kate Drennen, a citizen and resident of Franklin county, had married a citizen and resident of Alabama, who had expressed an intention of moving his residence to Florida but had not actually done so. Mrs. Drennen had maintained her home in Franklin county for several years prior to her marriage, and after her said marriage had continued to reside in her said home. Her husband spent considerable time with her in Franklin county but had not actually moved there. The lower court held Mrs. Drennen entitled to homestead tax exemption, which holding was affirmed by the supreme court by per curiam order.

We understand from the request that the wife mentioned in the above question is a citizen and resident of Dade county, although married to a citizen of another country. It does not appear from the record where the husband makes his permanent home. If the husband and wife consider the premises in question their permanent home and the wife and family have been residing thereon and making the same the family permanent home, we feel that the above question should be answered in the affirmative.

057-71—March 14, 1957

TAXATION

TAX EXEMPTION FOR PROPERTY HELD IN TRUST FOR BENEVOLENT OR FRATERNAL INSTITUTIONS OR ASSOCIATIONS—§1, ART. IX, §16, ART. XVI, STATE CONST. AND §192.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where real or personal property, or both, is held in trust by trustees for the use and benefit of some benevolent or fraternal institution or association, is such property entitled to exemption from ad valorem taxes?

In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, the title was held by trustees for the use and benefit of a lodge of the Benevolent and Protective Order of Elks, a fraternal order. The property in question appears to have been a lodge building used by the fraternal order, a portion of which was rented by the lodge to third parties as business houses and locations. No point was made in this case of the property being held by trustees for the use and benefit of the institution or association instead of by the institution or association itself. Due to the fact that the income from 43.1% of the property was not used for some religious, scientific, educational, literary or charitable purpose tax exemption was denied as to that portion.

The right to tax exemption under §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., is determined not by ownership alone but by ownership and use (1955-6 Biennial Report 409-411). For property to be exempt from taxation under the above mentioned laws it must be *held and used exclusively* for one or more of the purposes mentioned in said constitutional provisions. The use is just as important as the ownership. Without the concurrence of both there can be no exemption. Where real or personal property, or both, is held by trustees (whether corporate or individual trustees) for the exclusive use and benefit of some religious, scientific, educational, literary or charitable association, within the purview of either §1, Art. IX, or §16, Art. XVI, or both, of the state constitution, such ownership is sufficient to support an application for tax exemption if the property so held is held and used exclusively for one or more of the above mentioned purposes. Under §192.06(3), F. S., the rental of the properties therein mentioned and the use of the income from such rentals exclusively for one or more of such purposes does not defeat the tax exemption.

The above observations furnish the basis for determining tax exemption under §1, Art. IX, and §16, Art. XVI, and §192.06, F. S., from the facts and circumstances in each particular case. Because the actual use of the properties in question, and whether such use is exclusively for one or more of the purposes mentioned in the constitutional and statutory provisions above mentioned in this paragraph does not appear from the file, we are unable to give a final answer to the above question as applied to the specific property mentioned in the file before us.

057-72—March 14, 1957

LABOR

UNEMPLOYMENT COMPENSATION DIVISION—AVAILABILITY OF UNEXPENDED BALANCES FOR OPERATING EXPENSES AND SPECIAL EMPLOYMENT SECURITY FUND—§§443.12(2), 443.14(1), (2), F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTION:

Under the circumstances set forth below, is Florida industrial commission authorized to use available unexpended balances in the special employment security administration fund (§443.12(2), F. S.) for necessary operating expenses for the current fiscal year?

On October 18, 1955, the budget commission approved the budget submitted by Florida industrial commission for operation of the unemployment compensation and employment service divisions for the fiscal year ending June 30, 1957, in the total amount of \$5,485,525.

The same budget was forwarded to the bureau of employment security in the U. S. department of labor, as required by applicable federal laws and regulations to which the commission is subject in connection with administration of Florida's unemployment compensation law. On June 29, 1956, said bureau notified the commission that the former had approved an amount "equal to \$4,506,945 to administer the employment security program in Florida during the fiscal year ending June 30, 1957." Thereafter the bureau further notified the industrial commission that a shortage of funds at the federal level made it necessary for such bureau to reduce the amount previously approved by an additional \$339,050. In the meantime, the commission had planned its year's activities on the basis of the initially federally approved amount of \$4,506,945.

The commission now faces a shortage of approximately \$70,000 "in current curtailed and absolutely essential operations of the unemployment compensation and employment service divisions. This matter could be alleviated by some of the funds available in the special employment security administration fund The commission has determined that any unexpended moneys in the special employment security administration fund should now be used 'to cover expenditures necessary and proper under the law, for which federal funds have been duly requested but not yet received.'"

Section 443.14(2) F. S., creates the special employment security administration fund in the state treasury. The fund derives from interest on contributions, penalties, and fines and fees collected under Ch. 443. This subsection authorizes use of said funds, among other things, for the following purposes (separated and numbered for reference convenience):

- (1) Said moneys shall not be expended or be available for expenditure in any manner which would permit their substitution for (or permit a corresponding reduction in) federal funds which would, in the absence of said moneys,

be available to finance expenditures for the administration of the unemployment compensation law.

(2) But nothing in this section shall prevent such moneys from being used as a *revolving fund* to cover expenditures, necessary and proper under the law, for which federal funds have been duly requested but not yet received, *subject to the charging of such expenditures against such funds when received.* (Emphasis supplied.)

(3) The moneys in this fund, with the approval of the state budget director, shall be used by the commission for the payment of costs of administration which are found not to have been properly and validly chargeable against funds obtained from federal sources.

Cost of administration of Florida's unemployment compensation law is payable from the employment security administration fund, as provided in §443.14(1), F. S. We find nothing in that subsection which would preclude payment of any such costs of administration from the special employment security administration fund, provided such is authorized by §443.14(2). Attention is directed to the above-quoted purposes for which moneys may be expended from said latter fund.

Above-quoted paragraph (2) refers to a "revolving fund," and "for which federal funds have been duly requested but not yet received," and "subject to the charging of such expenditures against such funds when received." There is here contemplated a request for federal funds, the eventual availability of such funds, and the replacement in the "revolving fund" of the amount expended in anticipation of receipt of federal funds.

Above-quoted paragraph (3) obviously is not applicable; but reasonably above-quoted paragraph (1) is a source for the deficiency which now confronts the commission. Expenditure of available moneys under the authority of this provision to care for this deficiency does not violate the prohibition against substitution for or reduction of federal funds otherwise available. If as result of the drastic cuts made by the mentioned federal bureau in the submitted budget of the commission, it is essential to the proper administration of the unemployment compensation and employment service divisions for the fiscal year that available balances up to \$70,000 in the special employment security fund be applied to such administrative costs, such is not prohibited.

Subject to the approval of the budget commission, the question is answered in the affirmative, but conditioned as follows:

It is to be noted that the above conclusions are premised upon a presently existing situation which reasonably indicates that no federal funds are available to cover the mentioned deficit. While it is apparently extremely unlikely that any of the cuts in federal funds for this fiscal year will be made good, should that happen, then such funds as may be received from the government up to the amount of withdrawals in pursuance of this opinion and the approval of the budget commission from the special employment security fund shall be paid into said latter fund.

057-73—March 14, 1957

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—FEE FOR CERTIFIED COPY OF JUDGMENT OF SMALL CLAIMS COURT FURNISHED PURSUANT TO §324.111, F. S.—§42.17, F. S.

To: *Sylvan McElroy, Judge, Small Claims Court, Orlando*

QUESTIONS:

1. Where, under the provisions of §324.111, F. S., a certified copy of a judgment of a small claims court, created under Ch. 42, F. S., is forwarded to the insurance commissioner of the state at the request of the judgment creditor or his attorney, is the judge or clerk of said court entitled to compensation for such service?

2. If the answer to question 1 is in the affirmative, by whom shall the fee be paid?

Section 324.111, F. S., provides as follows:

Whenever any person fails within sixty days to satisfy any judgment, upon the written request of the judgment creditor or his attorney it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this state, to forward to the commissioner immediately after the expiration of said sixty days, a certified copy of such judgment. Laws 1955, c.29963, §1.

This statute is a part of the so-called financial responsibility law of the state. Neither §324.111, F. S., nor Ch. 42, F. S., specifically provides a fee for the furnishing of a certified copy of the unsatisfied judgment.

In opinion 052-173, dated June 2, 1952 (AGO 1951-1952, p. 77), copy of which is enclosed, we held that the judge of the small claims court was not entitled to extra compensation for the issuance of an execution, inasmuch as it is part of the proceeding proper and included within the flat fee provided by §42.11, F. S. However, we further held that the clerk was entitled to a fee for the furnishing of the transcript of judgment contemplated by §42.17 (1), F. S., where the same was for the purpose of filing in the office of the clerk of the circuit court thereby creating a lien upon the real estate of the defendant located within the county. We also stated that the judge or the clerk of the small claims court might charge for certified copies of his records at the rate provided for similar services performed by clerks of the circuit court. That being the case, the fee for furnishing the certified copy, pursuant to the provisions of §324.111, F. S., should properly be paid by the judgment creditor or his attorney requesting that the same be forwarded to the insurance commissioner of the state.

This answers both questions.

057-74—March 15, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—DEFINITION OF "ISOLATED SALE"
UNDER §517.06(3), F. S.—CHAPTER 21709, 1943.

To: *Florida Securities Commission, Tallahassee*

QUESTION:

What constitutes an "isolated sale" of securities within the purview of §517.06(3), Florida Statutes?

The provisions of Ch. 517, F. S., do not apply to an "isolated sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof, who, being the bona fide owner of such securities disposes of his own property for his own account and such sale is not made directly or indirectly for the benefit of the issuer or an underwriter of such securities or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provisions of" said Ch. 517 (§517.06(3) F. S.). The term "isolated sale" was inserted into the section by Ch. 21709, acts of 1943. This insertion seems to have limited the section as originally drafted.

In *Commonwealth v. Summons*, Pa., 41 A. 2d 697, text 699, the court, after remarking that the word "isolated" is not a word of art or technical meaning, said that "whether sales of stock by an owner are isolated or repeated and successive transactions indicating a course of dealing must depend upon the facts of each case in the light of the purpose of the act . . . the legislation was not enacted to foster fraud but to prevent it The act explicitly permits an owner to make more than a single sale of his stock, and he may safely dispose of it piecemeal on occasion, for profit, from convenience or other legitimate motive. But where the sales by an unregistered owner, though detached and separate, recur within such reasonable time as to indicate an association of acts under one general purpose, such sales are not 'isolated' but are within 'the course of repeated and successive transactions' prohibited by the act." In this case four sales were made between Sept. 21, 1941, and Jan. 23, 1942, for considerations totaling about \$11,400, which transactions were held *not* to be isolated sales.

In *Ersted v. Hobart Howry Co.*, S. D., 290 N. W. 66, text 68, the court remarked that an *isolated sale* "means one standing alone, disconnected from any other . . . two sales of securities, made one after the other within a period of such reasonable time as to indicate that one general purpose actuates the vendor and that the sales promote the same aim and are not so detached and separated as to form no part of a single plan, would be 'repeated and successive transactions.'" In *Silvertooth v. Kelly*, 162 Or. 381, 91 P. 2d 1112, text 1115, the court said that an isolated sale was one not made in the course of repeated and continuing transactions. In *Geneva Steel Co. v. State Tax Commission*, Utah, 209 P. 2d 208, text 212-13, the court defined isolated sales as those of a non-recurring nature made by persons not engaged in a business. In *Kneeland v. Emerton*, 280 Mass. 371, 183 N. E. 155, text 160, the court said that a similar provision in the statutes of that state was designed for the benefit of those persons who, not being brokers or dealers, desire to sell securities which they happen to

own without splitting their holdings so as to make repeated and successive sales and without being underwriters of such securities. We have no court decision of this state construing and defining the application of said §517.06(3), F. S.

The above question is not one capable of specific and definite answer; however, we feel that the above observations may and should be applied in each particular case to determine the question as applied to specific questions based on specific facts and circumstances. We doubt that the specific case set out in the quest for opinion, which might consist of upward of 90 transactions and involve up to 1400 shares of stock, would be isolated transactions, which could be brought within the purview of said §517.06(3) F. S.

057-75—March 20, 1957

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COUNTY BUILDINGS, ERECTION, ETC.—USE OF TAX LEVIED AND COLLECTED UNDER §135.01, F. S., WHERE BONDS FOR WHICH TAX MONEY IS EARMARKED ARE DECLARED INVALID

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What disposition may be made of funds collected under and pursuant to §135.01, F. S., earmarked for the payment of principal and interest on revenue certificates to be issued in connection with the repair or extension of a county hospital, where the bonds proposed have been held invalid in a bond validation proceeding?

It is our information that Manatee county, by proper resolution, levied and assessed an ad valorem tax, under and pursuant to §135.01, F. S., earmarking the same for use in paying interest and principal on revenue bonds or certificates thereafter to be issued by the county in connection with the repair or extension of the county hospital. However, upon attempt to validate the said revenue certificates or bonds they were held invalid by the supreme court by reason of the failure of the county to comply with the requirements of §6, Art. IX, State Const. (*State v. County of Manatee, Fla.*, decided March 6, 1957, but not yet reported). We find nothing in the opinion in the above cause which would seem to invalidate the levy and assessment of taxes, by the board of county commissioners, under said §135.01, F. S.

Whenever a board of county commissioners deem it necessary that a courthouse, jail or other county building be erected, repaired or added to it may, after complying with the requirements of §135.01, F. S., "levy a building tax not exceeding five mills per annum, for not more than thirty consecutive years, *in lieu of all other county building tax . . .*" We gather from the authorities that taxes levied as aforesaid for the establishment of a building tax (for the construction, repair or extension of the courthouse, jail or other county building) may be encumbered, by a proper pledge and full compliance with statutory and constitutional requirements, and earmarked for the payment of revenue certificates or bonds the proceeds of which are to be used for the construction, repair or extension of the county buildings afore-

said. If we are correct in presuming that the funds in question were derived from a tax levy made under and pursuant to said §135.01, F. S., then it would seem that the tax levy was specifically and directly made for the creation of a fund for the construction of the county building or buildings contemplated by the board of county commissioners. The resulting fund was a county building fund.

We find nothing in said §135.01, F. S., requiring the pledging of the funds raised by taxation thereunder for the payment of any indebtedness; as a matter of law we see no reason why an annual tax may not be levied thereunder for the creation of a fund from which a county building may be constructed, repaired or extended at some time in the future. The attempted pledge of the tax fund having been invalidated by the opinion in *State v. County of Manatee*, supra, it seems that we are left with a fund created for the construction, repair or extension of county buildings. The fund seems to be a valid one, although expenditures therefrom should be made pursuant to a duly adopted budget. Expenditures budgeted from the fund must be, by reason of said §135.01, F. S., for the purpose of constructing, repairing or extending county buildings.

Where, as we are advised, the county commissioners have started the construction, repair or extension of a public county hospital, and have provided for and levied a tax under §135.01, F. S., although in contemplation of the issuance and sale of revenue certificates or bonds payable from the taxes levied and assessed pursuant to §135.01, F. S., we see no reason why funds derived from the said tax levy may not be used in connection with the said building or construction work so long as the fund derived from such tax is not encumbered by a lawful pledge; provided, however, proper budgets have been adopted.

Answering the above question the fund derived from the taxes imposed under said §135.01 F. S., must be used for the purposes mentioned in said section, and where an attempt has been made to encumber certain of such funds by revenue certificates or bonds but such attempt has proven to be invalid, as in this case, we see no reason why, when properly budgeted, such funds may not be used for any of the purposes mentioned in said §135.01 F. S. Where the county has commenced the construction of a hospital we see no reason why a part of such fund, properly budgeted, may not be used to protect such construction until further construction is provided for.

057-76—March 22, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
AUTHORITY OF COUNTY TO LEASE ITS PROPERTY—
§§125.35-125.36, F. S.**

To: Declan O'Grady, County Attorney, Taylor County, Perry

QUESTION:

May the board of county commissioners of Taylor county enter into a lease with a private corporation of county owned property for a period extending beyond the terms of all of the present members of the Board of County Commissioners?

In opinion 052-155, dated May 15, 1952 (AGO 1951-1952, p. 228), we held that a county might properly enter into a *one-year* lease of a vacant building for which it has no present use, by following the provisions of §§125.35-125.36, F. S., provided it calls for and receives bids in accordance with said statutes. However, due to the factual situation our opinion does not answer your question.

In addition to the information contained in your letter we were given to understand that the lease would run five, 10 or possibly 15 years and the use of the property be limited to a particular kind of business.

The board of county commissioners must first determine that it is in the best interest of the county to enter into the proposed lease. (§125.35, F. S.). It must also be factually established that the property is "not needed for county purposes."

In opinion 051-184, dated June 29, 1951, we considered a 10-year lease for the purpose of housing a state agency. The authorities cited in the opinion announce the rule that generally, as to governmental functions, in the absence of statutory authority, a contract by public officers may not properly extend beyond the terms of the officers, but as to proprietary or business functions the contract may be entered into to the same extent as though the officer were a private individual. (43 Am. Jur., p. 101; 67 C. J. S., p. 370; 70 A. L. R. 794 and 149 A. L. R. 336).

Since we concluded in opinion 052-155, mentioned above, that the power to sell included the authority to lease county property under the same circumstances, it would seem to logically follow that if the board of county commissioners may divest the county of its entire interest in property by the sale thereof, it might enter into a contract of lease for a period of years extending beyond their respective terms of office. However, any lease must necessarily be subject to the rule of reasonableness as to its provisions and the term thereof.

This brings us to a consideration of whether or not the invitation to bid may restrict the use to that of a particular business so as to shut out other businesses desiring to bid. Section 125.36, F. S., permits the board "... to sell any property, real or personal, not needed for county purposes, for such price and upon such terms and conditions as said board may deem proper..." The words "terms and conditions" are, I believe, to be construed as referring to the financial arrangements. They are not to be interpreted as granting to the board of county commissioners the authority to restrict the use of the property to a particular business or enterprise. The reason for permitting the sale or lease of county property is that it is no longer needed for county purposes. The duty would seem to be placed upon the board of county commissioners to lease upon the most favorable terms to the county, irrespective of the use to which the leased property is to be put. As a matter of fact, the statute requires that "the bid of the highest bidder, complying with the terms and conditions set forth" in the notice be accepted "unless the board of county commissioners shall reject all bids because the same are too low."

Unless the particular kind of business was the "highest bidder," I do not think its bid may properly be accepted.

This answers the question as definitely as possible.

057-77—March 22, 1957

INSURANCE

MINIMUM CAPITAL INVESTMENTS, DOMESTIC INSURANCE COMPANIES—ELIGIBILITY OF JACKSONVILLE EXPRESSWAY AUTHORITY BONDS—§§349.14, 626.04, 518.10, 635.27-635.33, 631.06, 638.03 AND 648.02, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

May a domestic insurance company invest in securities issued by Jacksonville expressway authority?

Jacksonville expressway authority was created a body politic and corporate and an agency of the state under provisions of Ch. 29996, 1955 (Ch. 349, F. S.). It is here sufficient to state that the authority is empowered to construct or acquire an expressway system for the Jacksonville metropolitan area, consisting of approaches, streets, roads, bridges, etc., as described; in that connection to enter into a lease-purchase agreement with the state road department of Florida; and to issue bonds payable from rentals from tolls derived from certain bridges and any other revenue producing facilities and from the 80% surplus gasoline tax accruing for use in Duval county. It is assumed the resolution or bond indenture adopted by the authority is in harmony with these mentioned provisions.

Section 349.14, F. S., provides: "Any bonds or other obligations issued pursuant to this chapter shall be and constitute legal investments for banks, savings banks, trustees, executors, administrators, and all other fiduciaries, and for all state, municipal and other public funds and shall also be and constitute securities eligible for deposit as security for all state, municipal or other public funds, notwithstanding the provisions of any other law or laws to the contrary." In light of the eligibility of these bonds for investment purposes as detailed, reasonably we may assume that insurance companies were not included through error; yet we must accept the law as it is written. The nature of operation of insurance companies involving unearned premium reserves (as to fire, casualty, surety) and legal reserves (as to life), might urge the position that in a liberal sense the words "other fiduciaries" used in the section should include insurance companies; however, the definition of "fiduciary" in §518.10, F. S., in our opinion will hardly tolerate such a construction.

When we speak of investments of domestic insurance companies we must give regard to (1) minimum capital investments as a condition to beginning and continuing operations as prescribed by §626.04, F. S.; (2) authorized investments of life companies as set forth in §§635.27-635.33, F. S.; and (3) that as to other than minimum investments, there are no detailed authorized investments for other domestic insurance companies. Possible exceptions to this last statement may be found in certain deposits required of insurers (§§631.06, 638.03, 648.02, F. S.), and reserves required of reciprocals (§628.06, F. S.); but these should not be disturbing in relation to the question, since reasonably the securities constituting such deposits or reserves as may meet the requirements of securities for minimum capital investment purposes are to be computed with respect to that requirement.

Heretofore we approved the administrative construction of the insurance commissioner that the provisions of §624.04 were not disturbed by those of §§635.27-635.33. See copy of opinion 055-130 (1955-56 Biennial Report, 168). While bonds of the authority are payable from rentals deriving *in part* from certain toll bridges, even though there are other sources of revenue for that purpose, it would appear that these securities will fall within the meaning of §635.27(5). Attention is directed to the words in such subsection, "if no default on the part of the issuer in payment of principal or interest has occurred . . . within five years prior to date of investment"; and our conclusion in opinion 055-130 to the effect that no five-year waiting period was required under the quoted words.

With further respect to life companies, there are the provisions of §635.31, F. S., as to which see our discussion of the 2nd question in opinion 055-130.

Turning now to domestic insurance companies other than life, as stated we have no specific statutes relating to the nature of investments other than the minimum capital investment requirements of §626.04. At this point we find ourselves in the field of the reasonable judgment and discretion of the insurance commissioner under his supervisory powers within the limits of applicable statutes in relation to sound insurance practices and accountancy. In view of the eligibility for investment purposes of the securities of the authority as set forth in §349.14, and the apparent, eligibility of such securities for investment for domestic life insurers under §635.27(5), reasonably it would appear that such securities should be acceptable also as investments for domestic insurance companies other than life companies. It would appear that if by reason of default, within the meaning of the above-quoted words from §635.27(5), the securities here dealt with become ineligible for life insurers the insurance commissioner can assume the position that they are not eligible securities for other domestic insurers.

In view of the foregoing, in my opinion the question is answered as follows:

(1) Not less than \$100,000 of capital of domestic insurance companies must be invested as required by §626.04, F. S.

(2) Capital in excess of \$100,000 and reserves of domestic life insurance companies may be invested in securities of Jacksonville expressway authority; provided that if at any time there should be default with respect to principal or interest of such securities, as contemplated by such §635.27(5), then such bonds shall not be eligible for said investment purposes until the lapse of five years from the date of any such default.

(3) In line with the reasoning set forth above, we recommend to the insurance commissioner the eligibility of such securities for investments by domestic insurance companies other than life companies of capital in excess of \$100,000 and surplus under the same conditions and circumstances as set forth in the preceding paragraph in relation to domestic life companies.

057-78—March 22, 1957

CRIMINAL PROCEDURE

ARREST FOR DRUNK DRIVING—COPY OF DRUNKOMETER REPORT—§909.18, F. S.

To: Richard E. Gerstein, State Attorney, Miami

QUESTION:

Does §909.18, F. S., give a defendant in a drunk driving case the right to have a copy of a drunkometer report which is the result of an examination submitted to by him after he was arrested for said offense?

Section 909.18 F. S., (originally enacted as §154 of Ch. 19554, acts of 1939) reads as follows:

909.18 Discovery and production of documents and things for inspection, copying or photographing—When a crime has been committed and the evidence of the state shall relate to ballistics, fingerprints, blood, semen, or other stains, or documents, papers, books, accounts, letters, photographs, objects, or other tangible things, upon motion showing good cause therefor, and upon notice to the prosecuting attorney, the court in which the action is pending, whether the committing magistrate's court or the court having jurisdiction to try the cause, may order the state to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things. In examinations to be conducted by representatives of the state, as to ballistics, fingerprints, blood, semen, and other stains, the defendant, upon motion and notice, as aforesaid, shall be permitted under order of court, to be present, or have present, an expert of his own selection, during the course of such examination. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just.

In *Williams v. State*, 197 So. 562, the appellant contended that this statute was applicable to confessions and that it was error for the trial court to overrule his motion to require the state to produce his confessions for inspection. In holding against his contention, the supreme court of Florida said:

Section 154 of Ch. 19554, *supra*, provides for the production and discovery of documents and things for inspection on the part of a defendant or his counsel in a criminal prosecution. The meaning of the statute is clear and free from uncertainty and ambiguity in that it specifically enumerates the "documents and things" that a court can by an order require the State of Florida to produce on proper application. These enumerated documents and things are fully set forth and described. *The statute fails or omits to include written confessions made by a defendant*, but does provide for the production of "other tangible things," which words cannot be construed or interpreted to include written confessions as here involved. (Section 154 of Ch. 19554, which is refer-

red to in the foregoing quotation, is now §909.18, F. S.)
(Emphasis supplied.)

What the statute authorizes the court to order produced for inspection is "any designated papers, books, accounts, letters, photographs, objects or other tangible things" and, if these words do not include written confessions (and the supreme court held that they did not in the Williams case, *supra*), then I do not see how they can rightly be said to include a drunkometer report which is the result of an examination submitted to by a defendant after his arrest for drunk driving.

Therefore, it is my opinion that your question is properly answered in the negative.

057-79—March 22, 1957

**REGULATION OF PROFESSIONS AND VOCATIONS
OPTOMETRY, PRACTICE OF—§§463.01, 463.12, F. S.**

To: *Homer L. Pearson, Secretary-Treasurer, State Board of Medical Examiners of Florida, Miami*

QUESTIONS:

Is an optometrist permitted to:

1. Administer drugs and perform surgery?
2. Use orthoptic measures in treatment of eye conditions?
3. Fit contact lenses?
4. Certify persons as being blind for the purpose of receiving state financial aid?
5. Examine school children for state assistance?
6. Examine injured workmen for disability ratings under workmen's compensation proceedings?

The practice of optometry is a profession and is defined as follows:

To be the diagnosis of the human eye and its appendages, and the employment of any objective or subjective means or methods for the purpose of determining the refractive powers of the human eyes, or any visual, muscular, neurological or anatomic anomalies of the human eyes and their appendages, and the prescribing and employment of lenses, prisms, frames, mountings, orthoptic exercises, light frequencies and any other means or methods for the correction, remedy, or relief of any insufficiencies or abnormal conditions of the human eyes and their appendages. (§463.01 F. S.)

Optometry has also been defined as the employment of any means *other than the use of drugs* for the measurement of the powers of vision and the adaptation of lenses for the correction and aid thereof. (*Martin v. Baldy*, 249 Pa. 253, 94 A. 1091; *Babcock v. Nudelman*, 367 Ill. 626, 12 NE 2d 635.) Optometry is defined in Webster's new collegiate dictionary as "measurement of the range of vision. Scientific examinations of the eye to detect diseases or defects, prescription of correctional lenses or exercises but not of the use of drugs, and supplying of lenses."

The practice of optometry, as defined by §463.01, F. S., and cases from other jurisdictions, obviously does not authorize optometrists to administer drugs or perform surgery in the diagnosis of, or treatment of the refractive powers of the human eye. Therefore, Question 1 is answered in the negative.

Section 463.01, F. S., specifically authorizes optometrists to employ orthoptic exercises for the correction, remedy, or relief of any insufficiencies or abnormal conditions of the human eyes and their appendages. Therefore, Question 2 is answered in the affirmative.

The fitting of contact lenses would appear to come within the meaning of "any other means or methods for the correction, remedy, or insufficiencies or abnormal conditions of the human eyes and their appendages." Therefore, unless the fitting of contact lenses requires the use of drugs or surgery, Question 3 is answered in the affirmative.

Section 463.12, F. S., provides:

Testimony of any optometrist registered in the state at any trial or hearing held in the state under the laws of the state relative to the diagnosis of the human eye and its appendages or any visual, muscular, neurological or anatomic anomalies of the human eyes and their appendages of any person shall be considered qualified expert evidence and testimony in any such trial or hearing. Certificates of ocular and visual diagnosis, acuity and efficiency issued by any registered optometrist of this state shall be accepted as qualified evidence of the ocular and visual diagnosis, acuity and efficiency of the persons to whom said certificates shall relate.

Any agency of the state or county, or any commission, clinic, or board administering relief, social security, health insurance or health service under the laws of the state shall accept the services of optometrists registered in this state for the purpose of diagnosing and correcting any and all visual, muscular, neurological and anatomic anomalies of the human eyes and their appendages of any persons under the jurisdiction of said agency, clinic, commission, or board administering such relief, social security, health insurance or health service, on the same basis, and on a parity with any other person authorized by law to render similar professional service, when such services are needed, and shall pay for such services in the same way as other professions may be paid for similar services.

It is our opinion that, pursuant to said §463.12, F. S., optometrists may give expert evidence relating to the ocular and visual diagnosis, acuity and efficiency of the vision of persons to whom such evidence relates. The persons to whom the evidence is submitted would not be absolutely bound thereby. Persons to whom the evidence is given would be authorized to evaluate the evidence and seek from other competent witnesses evidence bearing upon the question or issue before them.

Questions 4, 5 and 6 are answered in the affirmative.

057-80—March 22, 1957

PUBLIC LANDS AND PROPERTY

**CONSTRUCTION OF CH. 31182, 1955—PARADISE ISLAND
OVERFILL—CH. 271 AND §253.12, F. S.**

To: C. Ray Smith, County Attorney, Clearwater

QUESTION:

Has Chapter 31182, 1955, any application to a parcel of submerged sovereignty land which has been filled in, in part or in whole, without specific state or public authority, prior to the effective date of said chapter?

This opinion specifically involves Paradise island in Pinellas county, which appears to have been a small surveyed island in the navigable waters of the said county, which has been, from time to time, extended by filling in around the said island. Some of this filling in is presumed to have been done under and pursuant to the so-called Butler act (Ch. 271, F. S.) and some of said filling may not have been under and pursuant to the said Butler act. The question of the application of the said Butler act to said lands, after the effective date of Ch. 26776, 1951 (May 29, 1951), which now appears as §253.12, F. S., is brought into doubt by the opinion of the supreme court of Florida in *Duval Eng. and Contr. Co. v. Sales, Fla., 77 So. 2d 431*.

For the purposes of this opinion we shall presume that any filling done prior to said May 29, 1951, was done under the Butler act and that such filling vested title to the filled area in the upland owner making the fill (*Holland v. Fort Pierce Financing and Const. Co., 157 Fla. 649, 27 So. 2d 76*). Therefore, this opinion concerns fills made between May 29, 1951, and the adoption of said Ch. 31182 (effective date June 23, 1955), and fills made subsequent to said June 23, 1955, and whether either or both classes of land is within the purview and operation of said Ch. 31182.

The general purpose of said Ch. 31182, which created and established the Pinellas county water and navigation control authority, was to provide for the adequate regulation and control of "all water, water courses, waterways, inlets, bays and bayous, and their alteration by dredging, filling, pumping or otherwise altering the shoreline, land contours and/or water areas and in the interest of public rights, public welfare, protection of public riparian property rights and the preservation of the natural beauty and attractiveness of the bays, bayous, harbors, streams, water courses and inlets" and to "regulate and exercise control over the dredging and filling of all submerged bottom lands in the waters of Pinellas county, together with all islands, sandbars, swamp and overflowed lands, including sovereignty lands" (section 2, chapter 31182, 1955).

The power and authority of the authority to regulate and control is made applicable "to the filling and dredging of all submerged bottom lands, islands, sandbars, swamp and overflowed lands, including sovereignty lands, in Pinellas county." with certain exceptions not here material (§4, Ch. 31182, 1955). "Any person, firm or corporation desiring to do any dredging, pumping

of sand, filling of any submerged lands, extension of lands, construction of islands in or under said navigable waters, shall make application" to the said authority for a permit to do such work (§8, Ch. 31182, 1955). These permits are granted under the regulations provided in the said act.

The authority has power and authority to "file recommendations with the trustees of the internal improvement fund of the state of Florida concerning the sale of all submerged land in the waters of Pinellas county, together with all islands, sandbars, swamp and overflowed lands including sovereignty lands" (§2, Ch. 31182, 1955). "The applicant or applicants for the purchase of submerged land, islands, sandbars, swamp and overflow lands, including all sovereignty lands, from the trustees of the internal improvement fund of the state of Florida shall, concurrently with the filing of said application with the trustees of the internal improvement fund, file a copy of the same with the Pinellas county water and navigation control authority, together with such other information as said authority may require." After the filing of such copy with the authority it is required to hold a public hearing concerning the said application and consider the same, and submit recommendations to the trustees of the internal improvement fund concerning same (§12, Ch. 31182, 1955). We find nothing in the said act limiting its application to inside waters of the county, but construe the act as applying to all the navigable waters of the county, which would seem to include offshore waters within the territorial limits of the county.

Unless authority is granted by law, owners of land bordering on navigable waters have no right to fill in any part of the submerged lands under such navigable waters, and they acquire no title to such lands that may be filled in (*McDowell v. Trustees Internal Improvement Fund, Fla.*, 90 So. 2d 715). Authority to fill in certain of such lands existed under the Butler act (Ch. 271, F. S.) in Pinellas county, at least prior to the effective date of Ch. 26776, 1951. Any part of Paradise island that may have been filled in in accordance with the Butler act prior to May 29, 1951, would seem to be vested in the upland owner or owners making the fill. *Duval Eng. and Contr. Co. v. Sales*, supra, raises the question of title to lands filled in by upland owners subsequent to May 29, 1951.

Any application for the purchase of any part of Paradise island, or other lands, in navigable waters raises the presumption that such purchases would be under §253.12, F. S., or similar statutes or laws, so that the application would be presumed to be one for the "purchase of submerged land, islands, sandbars . . ." or sovereignty lands, and therefore within the purview of §§2 and 12, Ch. 31182, 1955, above referred to. Any filling of said lands, whether above or below high water, by dredging from beneath navigable waters, would seem to be within the act and require a permit from the authority.

The above question is, therefore, answered in the affirmative to the extent above indicated. Copy of our opinion 056-295 is handed you for information.

057-82—March 22, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SMALL LOAN BUSINESS—PUBLIC AND CONFIDENTIAL
RECORDS, INSPECTION—§§516.03-516.05, 516.07 AND
516.11, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What correspondence, reports, letters and records, of the state comptroller, acquired, received, used or made by him in connection with the enforcement and administration of the small loan business in this state, under Ch. 516, F. S., are available to the public and interested parties?

Statutes regulating the business of making small loans have been sustained against various objections of infringement of state and federal constitutions, as being within the police power of the states (40 Am. Jur. 696, §8; Annotations in 69 A. L. R. 581, 125 A. L. R. 744 and 149 A. L. R. 1425). Such an act appears to have been upheld in this state in *Beasley v. Cahoon*, 109 Fla. 106, 147 So. 288. Chapter 516, F. S., is, therefore, deemed valid as a police regulation for the purposes of this opinion.

Chapter 516, F. S., requires that any person desiring to make small loans within this state obtain a license from the state comptroller (§§516.03 and 516.04, F. S.). This license appears to be a regulatory and not a revenue license only; in that upon investigation by the state comptroller the applicant may be denied a license for cause, which action of denial may be reviewed, evidently by the circuit court (§516.05, F. S.). Licenses issued may be revoked or suspended by the state comptroller for cause under §516.07, F. S. "For the purpose of discovering violations of" Ch. 516, F. S., the state comptroller is authorized to conduct investigations, either in person or by agent. "The licensing official and all persons duly designated by him shall have the authority to require the attendance of witnesses and to examine under oath all persons whose testimony may be required" relative to such investigations (§516.11, F. S.). In this connection the licensing official is authorized to make investigations to determine whether the small loan laws have been or are being violated. These investigations have features of investigations made by state attorneys and other persons charged with enforcement of the criminal laws. In making these investigations, letters, affidavits, written and oral information, much of it of a secret nature, are or will be obtained by the state comptroller. Confidential information would seem to be necessary for the proper enforcement of the small loan statutes and laws in this state, in a similar manner as is necessary to the proper enforcement of the criminal laws.

Generally speaking, the right to inspect and take copies of public records and documents is not an absolute right, but is subject to a number of limitations. Generally such records and documents are subject to inspection *where the disclosure will not be detrimental to the public interest* (76 C. J. S. 113-4, §35). "The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection. . ."

(45 Am. Jur. 433, §26; *Lee v. Beach Pub. Co.*, 127 Fla. 600, 173 So. 440, text 442). In determining whether communications to public officers are privileged there are in general two classes, (1) those relating to the affairs of state, commonly known as state secrets, and (2) those which relate to matters affecting only individuals (58 Am. Jur. 298, §533). This rule finds support in *Jones Commentaries on Evidence*, *Greenleaf on Evidence*, *Wigmore on Evidence*, and other works on evidence.

From the above and foregoing it seems that the applications for licenses and the licenses issued, orders and directives of the comptroller granting, revoking or suspending license would seem to be subject to public inspection; however, information obtained by the comptroller, in the nature of secret information from others and information obtained in connection with investigations which are of such nature that making them public would tend to defeat further and future investigations would seem to be state secrets and not subject to public inspection. What are and what are not state secrets is largely to be determined by the state comptroller. Where the correspondence, report, letter or record sought to be inspected is of the nature of state secrets, inspection should be denied unless ordered by a court of competent jurisdiction. No general answer may be given to the above question applicable under all conditions and circumstances; the matter is largely one to be determined from the facts, under the rules above mentioned, in each particular case by the state comptroller.

We hand you herewith copy of our opinion 049-125 as information only.

057-83—March 22, 1957

TAXATION

DOCUMENTARY STAMP TAXES—CORPORATE STOCK—EXCHANGES, ETC.—§§201.04 AND 201.05, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where the owner of shares of no par value corporate stock in a domestic corporation surrenders such stock to the corporation with instructions to issue substitute par value stock to certain named persons in lieu thereof, are the par value certificates of stock subject to documentary stamp taxes?

We are advised that after the issuance of the no par value stock to such owner, the corporate charter was revised and amended so as to change the capital stock structure of the said corporation and substitute par value stock for the said no par value stock. After this amendment of the corporate charter, a holder of 104 shares of the no par value stock surrendered such stock in exchange for 104,000 shares of the par value stock; and at the same time directed that such par value stock be issued to certain named persons other than itself. The effect of the issue of the par value stock in exchange of the no par value stock was to transfer the stock ownership from the original owner to third persons, although the original no par value stock was never actually assigned to such third persons by the original owner.

Had the no par value shares of stock been assigned to the

third persons and had by them been surrendered to the corporation for the issuance of new no par shares or the substitute par value shares of stock, the transaction would seem to be subject to taxation under the rule in *Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22, case. Title to the no par value stock having been in one party and title to the par value stock having passed to third parties, there must have been a change of title from the said first party to the second parties prior to the issuance of the par value stock. There must have been some direction, either oral or written, from the owner of the no par value stock to the corporation directing the issuance of the new or par value stock to the third persons. We, therefore, are of the opinion that such transaction accomplished a transfer of the title to shares of stock to the said third persons and is taxable under and by virtue of §201.04, F. S. We doubt that the transaction was subject to taxation under §201.05, F. S.

We are, therefore, of the opinion that the par value shares of stock issued to the third persons were subject to taxation under §201.04, F. S., as a transfer or assignment. This seems to answer the above question.

057-84—March 22, 1957

TAXATION

TAXABLE SITUS OF BOATS AND VESSELS—§§192.03, 193.10, 200.01 AND 200.44, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the taxable situs of boats and vessels registered with the coast guard and customs office in this state?

Boats and vessels having a situs in this state are considered as tangible personal property for purposes of taxation (§§192.03 and 200.01, F. S.); and persons owning boats and vessels having a tax situs in this state are required to list and return the same for taxation "in the county in which the same may belong or be enrolled, registered or licensed" (§193.10, F. S.). Section 200.44, F. S., seems to relate only to pleasure yachts and boats of non-resident ownership which are enrolled, registered or licensed in other states. Boats and vessels with no established situs, but sailing from port to port or from place to place, as the necessities of business may demand, usually should be assessed for ad valorem taxes at their home port or at the domicile of their owner, "but a vessel may be assessed for taxation purposes without reference to the home port or the residence of the principal owner or agent, when it is put to such use as to impress it with a local character" (*Arundel Corp. v. Sproul*, 136 Fla. 167, 186 So. 679, text 681). In *Arundel Corp. v. Sproul*, a large dredge was enrolled, registered or licensed at the port of Baltimore, Maryland, but was engaged in extensive dredging operations in Palm Beach county and had been for many months; this was held sufficient to impress it with a local character, and subject it to taxation in Palm Beach county.

"With respect to the situs of ships and vessels for tax purposes, as between local taxing units of the same state, it may be

said that in general, this is a question for the legislature, and, accordingly, vessels are to be taxed in the local taxing unit designated by statute (51 Am. Jur. 809, §914). This seems to lead us back to §193.10, F. S., which provides for the return of boats and vessels by their owner "in the county in which the same may belong or be enrolled, registered or licensed." This seems to give the owner of boats and vessels, which have been enrolled, registered or licensed, by the coast guard and customs office, at some location in this state, the election of returning such boats and vessels either in the county where they *belong* or at the location shown in their enrollment, registration or license issued by the coast guard and customs office.

From the above and foregoing it seems that where a boat or vessel is located or has an actual situs in one county but its location or home port is shown in this state by the enrollment, registration or license issued by the coast guard and customs office in another county, that the owner may, at his election, return the said boat or vessel in either county, thereby fixing its situs for the purposes of ad valorem taxation. Where no return is made and filed by the owner we feel that the boat or vessel should be assessed in the county in which located or has its actual situs, when known, but when not known it may be assessed at its home port or location as shown in its enrollment, registration or license. Where the home port of a boat or vessel is in another state but the boat or vessel has acquired a situs in this state, the rule in the *Arundel Corp. v. Sproul* case, above cited, should be followed, except as such rule may be changed by §200.44, F. S.

057-85—March 14, 1957 (Correcting 056-270)

SALE OF SECURITIES

EXEMPT TRANSACTIONS—CONSTRUCTION OF §517.06(8), F. S.

To: *Florida Securities Commission, Tallahassee*

Referring to our opinion 056-270, of Aug. 31, 1956, we find that an error was made in drafting the first sentence of the last paragraph of the opinion, which sentence should have read as follows:

In the light of the above and foregoing, we feel that said §517.06 (8), F. S., permits only a single filing as to any group of notes secured by a single mortgage, there may not be successive filings as to any one group of notes secured by a single mortgage.

Where there are two or more sets of promissory notes secured by separate first mortgages encumbering separate tracts of land, we see no reason why successive filings may not be made by a single person, firm or corporation, so long as there is no fraud. In this connection we feel that you would be justified in requiring an appraisal of the mortgaged properties made by a duly qualified appraiser so that you will be satisfied that there is ample security in each particular case.

057-86—March 28, 1957

INSURANCE

APPLICATION OF ANTI-COERCION CLAUSE—HOME OWNERS POLICY—§§627.92 AND 643.04(10), F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Subsequent to issuance of opinion 054-195, among other new types of policies issued in this state was the "home owners policy." In view of the nature of such policy, and similar types, do the reasoning and conclusions set forth in said opinion represent the judgment of this office concerning the question therein dealt with at this time?

The opinion was issued Aug. 9, 1954. Subsequent to such date the "home owners policy" made its appearance in this state. Generally it may be stated that prior thereto, a fire insurance policy of the conventional type for buildings and dwellings consisted of fire and extended coverage; that the "home owners policy" furnished in addition to fire and extended coverage protection against other risks in the casualty field. The premium for this new type of policy, with its additional coverages, represented cheaper insurance to the insured than the previous type of policy mentioned. Other plans under other names of the same general nature of the "home owners policy" have made their appearance.

We see no reason to change our construction of §§627.92 and 643.04(10), F. S., in relation to the questions dealt with in said opinion 054-195, by reason of the appearance of these new types of policies.

057-87—April 4, 1957

TAXATION

AD VALOREM TAXATION OF CORPORATE STOCK; UNISSUED STOCK, ETC.—§§608.15 AND 608.17, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

Where a business corporation, duly incorporated, organized and existing under the statutes and laws of this state, has issued and has outstanding only a portion of the capital stock authorized by its corporate charter, may the unissued stock be subjected to ad valorem taxation as treasury stock by the county of its principal place of business?

"There is a wide distinction between the *authorized* capital stock of a corporation and its *actual* capital stock. Its authorized capital may never become actual capital, in consequence of never receiving any contributors. Its actual capital stock is the amount of its authorized capital that has been bona fide subscribed for and paid in" (*Stemple v. Bruin*, 57 Fla. 173, 49 So. 151, text 153). Corporate stock in this state may be issued only for an adequate consideration (see §608.15, F. S.).

The amount of capital of a corporation in this state is the amount of the stock issued for an adequate consideration (see §608.17, F. S.). "The mere fact that the certificate of incorporation

or charter of a corporation states that the capital stock is a designated amount . . . creates neither shares nor capital stock" (13 Am. Jur. 320, §203); it merely expresses the power of the corporation to issue corporate stock. "Only stock actually issued and outstanding may be voted . . . or considered in the determination of whether a quorum was present at a stockholders meeting . . ." (13 Am. Jur. 526, §486). Treasury stock refers to *issued* stock which a corporation has acquired (13 Am. Jur. 318, §199) and does not include unissued stock.

The above question is, therefore, answered in the negative.

057-88—April 4, 1957

TAXATION

TAXATION OF LAND AND SEAGOING TRAILERS AND CRUISERS—§320.08, F. S., AND §13, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the trailers or cruisers, manufactured by the Neptuna Corp., known as models 226, 234 and 250, and similar trailers and cruisers, motor vehicles within the purview of §13, Art. IX, State Const.?

These so-called land-and-water cruisers or trailers are so constructed that they may be used as automobile trailers or as boats in navigable waters. These so-called cruisers have facilities for sleeping four persons, kitchen facilities, dining areas, lavatory facilities, and most other facilities found in ordinary house trailers. On land the said cruisers are equipped for, and may be used as, ordinary automobile house trailers, while on water they may be used as well equipped boats.

"Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such vehicles, which license tax shall be in such amount and levied for such purpose as the legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property" (§13, Art. IX, State Const.). In *Wood v. Club Transportation Service*, 143 Fla. 449, 196 So. 843, a two-wheeled semitrailer used behind an automobile for transporting passengers and luggage to and from a hotel was held to be a part of a motor vehicle and within the purview of said §13, Art. IX, State Const.

After the adoption of the above constitutional provision, the legislature of this state made provision for the licensing of automobile trailers, including "small trailers," "trailers for private use," and "trailers for hire" (§320.08 F. S.). Under §320.01, F. S., "trailer," as used in said Ch. 320, F. S., is defined as including "all four wheel vehicles coupled to, or drawn by, a motor vehicle," and "semitrailer," as including "any two wheel vehicle coupled to, or drawn by, any motor vehicle." Automobile trailers are obviously useless as vehicles of travel until they become a part of a motor vehicle for the purpose of increasing its load capacity, and by the use of a trailer the load capacity of the motor vehicle is increased without increasing the motive power.

A trailer used in connection with an automobile to increase its load capacity is clearly a part of that motor vehicle, although

the trailer may be used incidentally for some other purpose. When a trailer is used as a part of a motor vehicle, it must obtain a motor vehicle license tag under §320.08, F. S., before it may be used on the highways. But should one of the trailers or cruisers herein considered be used only as a boat and never as an automobile trailer, it would not be within the purview of §320.08, F. S., and no motor vehicle tag would be required.

Answering the above question, if the trailer or cruiser mentioned in said question is to be used on the highways as a part of a motor vehicle to any appreciable extent it should be classified as a motor vehicle; however, should its primary purpose be that of a boat and it is not used on the highways to any appreciable extent it should be classified as tangible personal property subject to ad valorem taxation.

057-90—April 8, 1957

TAXATION

HOMESTEAD TAX EXEMPTION; NONRESIDENT OWNER AND RESIDENT DEPENDENT OCCUPANTS—§7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a nonresident owns a dwelling house in this state, in which persons naturally and legally dependent upon such owner make their permanent home within this state, is such owner entitled to homestead tax exemption of such property?

Prior to the present or 1938 homestead tax exemption amendment to the state constitution the exemption was to "every head of a family who is a citizen of and resides in the state of Florida." No provision was made in this amendment for homestead tax exemption when the property was being occupied by dependents of the owner. The present or 1938 amendment provides that "every person who has the legal title or beneficial title in equity to real property in this state and *who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person*, shall be entitled to an exemption from all taxation, except assessments for special benefits, . . ." The latter, or 1938, amendment is more liberal (see *Smith v. Voight*, 158 Fla. 366, 28 So. 2d 426) than was the former, or 1934, amendment (*Steuart v. State*, 119 Fla. 117, 161 So. 378).

The italicized portion of the above quotation from §7, Art. X, State Const., presents a problem of constitutional construction. The portion of the quotation which provides the exemption to an owner "who resides thereon and in good faith makes the same his or her permanent home," seems clear. However, the remainder of the quotations seems in doubt. Does it grant the exemption to an owner who "in good faith makes the same . . . the permanent home of another or others legally or naturally dependent upon such" owner; or does it grant the exemption to an owner "*who resides thereon and in good faith makes the same . . . the permanent home of another or others legally or naturally dependent upon said*" owner? In other words does the phrase "who resides thereon" re-

quire the owner of the premises to "reside thereon" whether the homestead is claimed as his own residence or the residence of those legally and naturally dependent upon such owner. If the owner is required to reside thereon in any event, the reference to "permanent home of another or others" seems to mean precisely nothing. Attorney General Gibbs, in his opinion of Jan. 19, 1939, phrased the exemption as to dependents as follows: "An exemption from all taxation except . . . shall be allowed to every person who has the legal or beneficial title in equity to real property in this state . . . where it is the permanent home of another or others legally or naturally dependent upon said person."

"Rules applicable to the construction of statutes are also applicable to the construction of provisions of the constitution, but external aids or arbitrary rules applied to the construction of a constitution are of uncertain value and should be used with hesitation and circumspection." (11 Am. Jur. 658, §49). "The general rules which have been established for the construction and interpretation of statutes are to be referred to, of course, for the purpose of resolving questions as to the import of the provisions in homestead laws." (26 Am. Jur. 13, §10). "It is frequently declared that statutes can have no extraterritorial effect. By this statement is meant that legislative enactments can operate, *priori vigore*, upon persons and things within the territorial jurisdiction of the law making power, and that no law has any effect, of its own force, beyond the territorial limits of the sovereignty from which its authority is derived." (50 Am. Jur. 508-9, §485).

"Laws exempting the homestead from liability for debts of the owner are strictly of American origin. At common law there was no such thing as a homestead right Homestead rights, therefore, exist only by virtue of constitutional and statutory provisions creating them." (40 C. J. S. 431, §2). Homestead laws are founded upon considerations of public policy, their purpose being to promote the stability and welfare of the state by encouraging property ownership and independence on the part of citizens and by the preservation of a home where the family may be sheltered and live beyond the reach of economic misfortune. (*Biglow v. Dunphe*, 143 Fla. 603, 197 So. 328; 26 Am. Jur. 10, §6; 40 C. J. S. 431, §2). Homestead tax exemptions appear to be an extension of this rule so that the home of a citizen which may not be taken away from him by process of law will not be taken by taxation; although the homestead tax exemption is broader than the other exemption. Although one of the schemes to be served by our homestead tax exemption provision, in the state constitution, may have been to entice people to come to Florida, we feel that such purpose was only a minor one and not the major purpose. If such was the purpose of the amendment, such purpose was to bring the householder to this state and not to bring mere dependents who in case of adversity might become charges of the state.

We are, therefore, of the opinion that the above stated question must be answered in the negative. The term "nonresident" as used in the above question is used in the sense of permanent residence and not citizenship. It is possible for a person to be a citizen of another state or country and still be a permanent resident of this state (see *Smith v. Voight*, 158 Fla. 366, 28 So. 2d 426) entitled to homestead tax exemption.

057-91—April 9, 1957

CITIES AND TOWNS

MUNICIPAL CORPORATIONS — DISPOSITION OF ASSETS UPON DISSOLUTION—§§165.26-165.28, F. S.

To: C. W. Nall, Mayor, South Flomaton

QUESTION:

In the event a municipal corporation surrenders its franchise under §§165.26-28, F. S., what disposition is to be made of its property and assets?

You have explained that the town of South Flomaton was organized under the general law pertaining to municipal corporations and it is now proceeding under §§165.26-28, F. S., with an election for the purpose of determining whether or not its franchise shall be surrendered.

Said statutes permit a municipal corporation to surrender its franchise where after petition by one-third of the registered voters of the municipality an election is held upon the question. If two-thirds of the votes cast are in favor of surrender of the franchise it "... shall stand and be deemed surrendered from the thirtieth day after the election." Any property or assets of the dissolved municipality are, by §165.28, made subject to legal process for the payment of any debts. In addition, the board of county commissioners may order, where necessary after dissolution, that taxes be levied for the purpose of paying any outstanding indebtedness. The requirements of §8, Art. VIII, Florida Const. are thus met. These statutes have been construed to be applicable to like effect to a municipality organized by special act of the legislature. (*Olds v. State ex rel. Cole*, 101 Fla. 218, 133 So. 641).

The general statutes referred to above do not vest any authority in any officer of the corporation after its dissolution to sell property or otherwise dispose of its assets for the purpose of paying any outstanding indebtedness or for any other purpose. The statute is entirely silent as to what disposition shall be made of any property or assets remaining after payment of all creditors. You have indicated that assets or property will remain after the debts have been satisfied in full. A dissolved municipality does not own property. (63 C. J. S., *Municipal Corp.*, §950). Dissolution takes away all municipal rights, privileges and franchises. (§8.14, *McQuillin, Municipal Corp.*, 3rd edition). Hence, upon dissolution the corporation entirely ceases to exist for all purposes. There is an interim 30-day period between the time of holding the election and the effective date of the surrender of the charter. (§165.26, F. S.). Certain functions of the corporation must be carried on during this time, such as police protection, and the like. So, necessarily, disbursements of city funds must be made. However, the statutes do not contemplate that contracts for public works shall be let so as to expand or add to present facilities.

It is stated in 63 C. J. S., *Municipal Corp.*, §950, at p. 501, as to the disposition of property in a municipal corporation upon its dissolution, as follows: "Its strictly public property reverts to the state, and, ... the legislature may dispose of it." See, also, 37 Am.

Jur., §42. The same section of Am. Jur. states that after dissolution "... the property which it had held for public uses is not subject to the payment of debts, rather, the property passes under the immediate control of the state. . . ." Also see 47 A. L. R. 137. The supreme court of the U. S., in *Meriwether v. Garrett* (1880) 102 U. S. 472, 26 L. Ed. 197 stated that property held for public use such as public buildings, streets, squares, parks and fire engine houses cannot be made subject to payment of the city's debt, but upon repeal of the charter the property passed under the immediate control of the state. However, in Florida the rule appears to have been changed by statute for §165.28, F. S., makes "any property or assets," irrespective of their public nature, subject to legal process for the payment of debts.

A distinction seems to be made upon dissolution between property held strictly for public or governmental purposes and that otherwise held by the municipality. In *Univ. of N. C. v. City of High Point* (N. C. 1932) 166 S. E. 511 the court held that under a N. Carolina statute the property of a dissolved municipal corporation held for public purposes escheated to the state. The opinion points out that the court was not dealing with property purchased by the municipality for other than strictly governmental purposes, such as waterworks, light plants and street railways which "may be subject to peculiar considerations." Dillon, *Municipal Corp.*, 5th edition, §113, treating the disposition of property of a municipal corporation, attempts to draw an analogy between a municipal corporation and a private corporation. He says the property is impressed with a trust so long as the legislature permits it to exist and for the benefit of the people, if the corporation is dissolved, but cites no authority to support the statement.

Inasmuch as all officers of the corporation are stripped of the powers and duties upon dissolution, they can perform no further acts for the city in an official capacity. They would have no power to sell or dispose of any property or in anywise distribute assets of the corporation without legislative authority. It is, of course, possible for the legislature, under §8, Art. VIII, Florida Const., to provide for disposition of the assets remaining after payment of debts.

Chapter 716, F. S., pertains to escheats, but apparently has no application to the situation under consideration.

Under the authority cited above it would appear that in the absence of legislation providing otherwise, municipal, public or governmental property remaining after payment of debts reverts to the state. Once having reverted to the state the legislature may provide for its disposition.

To summarize: there are no provisions in the general law permitting the sale of municipal property by the corporation either after the election approving surrender of the charter or subsequent to the 30-day period when dissolution becomes final. As a creature of the legislature that body may provide the method for liquidating its affairs.

This answers your question as definitely as it seems possible.

057-92—April 11, 1957

BUILDING AND LOAN ASSOCIATIONS
ORGANIZATION REQUIREMENTS FOR "DOMESTIC" BUILD-
ING AND LOAN ASSOCIATIONS—§§665.02, 665.04, AND
CHS. 659 AND 611, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a corporation was organized under the statutes of this state, for the transaction of a general safe deposit business, with the word "savings" as a part of its corporate name, was there a violation of §665.02, F. S.?

"Unless organized under the provisions of the law relating to building and loan associations, no corporation hereafter organized shall be entitled to use, as a part of its title or name; the word 'savings'; the word 'association' or 'society' in any combination with either of the words 'building' or 'loan'; the word 'company' or 'association' or 'society' in any combination with both of the words 'building' and 'loan'; provided, however, that the foregoing restrictions shall not prohibit the use of the word 'savings' by a corporation organized under the laws relating to banks and banking." (Emphasis supplied.) (§665.02, F. S.) The effect of the above statutory provision is to prevent the use of the word "savings" in the title or name of a corporation organized under the laws of this state except as therein authorized. This statutory provision was derived from Chs. 10028 and 11865, 1925 and 1926.

The charter of the corporation giving rise to the above stated question was organized under Ch. 611, F. S., during the year 1953, but before the effective date of the Florida banking code (Ch. 658-661, F. S.). The corporation in question does not appear to have been organized "under the provisions of the law relating to building and loan associations." The said corporation was organized with a capital of \$5,000; building and loan associations organized under the laws of this state are required to have a capital of not less than \$100,000 (§665.04, F. S.). Banks were required to have a capital of not less than \$25,000 or \$50,000, depending upon population, when the corporation in question was organized (Ch. 652, F. S., now replaced by the banking code of 1953 and especially Ch. 659, F. S.).

Although Ch. 611, F. S., was applicable when certain corporations were to be organized, including banks, banks and trust companies, safe deposit companies, etc., in order to organize a bank or bank and trust company Ch. 652 (now Ch. 659), F. S., had to be complied with, and to organize a building and loan association Ch. 665, F. S., would have to be complied with. Organization of a corporation under Ch. 611, F. S., did not constitute a bank or a building and loan association of itself, but the statutes specifically applicable to banks and building and loan associations had to be complied with.

The above stated question is, therefore, answered in the affirmative.

057-93—April 12, 1957

INSURANCE

ISSUANCE OF A NONASSESSABLE POLICY BY RECIPROCAL
—§§205.43, 628.06, 628.11, 628.13 AND 628.14, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

May a California reciprocal, qualified in Florida, issue the forms of nonassessable contracts of insurance filed with you for approval on Jan. 21, 1957?

As we construe the policy forms contemplated by the question, they offer "liability insurance" within the definition of that term in §108, insurance code of California, issued in 1953.

With respect to reciprocal or inter-insurance, Ch. 628, F. S., would seem to be controlling (§628.14 F. S.). Section 628.06 requires maintenance of certain reserves and surplus, and provides: "If at any time the aggregate deposit collected and credited to the subscriber's accounts shall not equal that amount, then the subscribers, or their attorney for them shall make up the deficiency."

There has been called to our attention the Indiana case of *Wysong v. Automobile Underwriters*, 184 N. E. 783, 94 A. L. R. 826. In that case the above question was dealt with in relation to an Indiana reciprocal. The applicable Indiana law was similar to the above-quoted portion of §628.06. The Indiana court held in effect that such provision did not prohibit the issuance of non-assessable contracts; that the nature of such contracts on the point is determined by the agreement between subscribers and the attorney and the issued policy; that subscribers have the right to limit their liability unless such conflicts with the statute; that the right to assess members cannot be implied or inferred but must be expressly granted; that the wording in the Indiana statute, "The subscribers or their attorney shall make up the deficiency," does not restrain the subscribers to limit their liability; that if such a deficiency is not made up, then the enforcement feature lies in the power to suspend or revoke the certificate of authority.

The provisions of Ch. 628 are not too clear in their application to a foreign reciprocal. The wording of the chapter is directed to a reciprocal domiciled in this state. Reasonably if there is no provision controlling foreign reciprocals in their operation in this state, they should not be admitted to the state. *Farmers Automobile Inter-Insurance Exchange v. McDonald*, Wyo., 140 P. 2d 905. However, we do not question the long-standing administrative construction that Ch. 628 is controlling with respect to foreign reciprocals. We do not consider that construction unreasonable. Support for that construction is found in §205.43, F. S., defining insurers subject to license and premium receipts taxes, including "attorneys doing business under Ch. 628," which enumeration of insurers is concluded by the words "domestic or foreign"; and also the reasonable implications of §628.13, F. S., which provides that associations "organized under the laws of Florida, embraced within the purview of this chapter," shall pay the same taxes and fees "as other domestic insurance companies and associations."

We consider that the reasoning in the *Wysong* case is logical; that the wording quoted above from §628.06 does not prohibit

subscribers agreeing to the issuance of nonassessable policies; that if a deficiency, as mentioned in said section, should occur, and there should be failure on the part of such subscribers or their attorney to make good such deficiency, then the provisions of §628.11, F. S., relating to revocation of certificate of authority, may be invoked. Attention is now directed to the laws of this reciprocal's domiciliary state.

There has been furnished us copy of the insurance code, state of California, issued in 1953. Some of the provisions in the code may have been changed since that date; however, that may be pointed out if true. In relation to the forms of contracts identified in the above question, it is suggested that a showing be made that under existing California laws the exchange has the right to issue these contracts, with particular reference to the following sections in said code (or if amended, as amended): §108 (definition of liability insurance); §1307(c) (relating to limitation of amounts payable by subscribers); and §§1390-1402 (relating to assessment of liability and workmen's compensation policies).

As we construe certain of these sections, under some circumstances subscribers are liable for assessments in connection with liability policies; but upon the exchange meeting stated requirements, such liability on the part of subscribers may be limited. We assume that these forms submitted by this exchange meet the full requirements of the applicable California statutes. However, I think it reasonable that you should have some evidence and assurance that these forms providing nonassessable coverage are issued in conformity with California laws.

In view of the foregoing, in my opinion the question is properly answered as follows:

(1) That in so far as Florida Statutes are concerned, if the agreement between the attorney-in-fact and subscribers provides in effect for the issuance of nonassessable policies as here found, such is authorized.

(2) It is suggested that a copy of this opinion be furnished this exchange. When they have met the requirements of the opinion by evidencing that these nonassessable policies are issued in conformity with California laws, you may approve the non-assessable feature of the contracts. When a response is received from this exchange, without delay this office will confer with you and advise if the requirements of this opinion have been met.

057-94—April 15, 1957

TAXATION

DESTRUCTION OF TAX SALE CERTIFICATES CANCELLED PURSUANT TO STATUTE — §§192.352, 192.37, 192.59, 192.60; 194.27, 194.28, 194.30, 194.31, 194.32, 194.33, 194.34, 194.35-194.39, 194.58, 194.59 AND 194.63, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May tax sale certificates cancelled under and pursuant to statutory authority be destroyed without specific statutory authority for such destruction?

Sections 192.352, 192.37, 192.59, 192.60, 194.27, 194.28, 194.30, 194.31, 194.32, 194.33, 194.34, 194.35-194.39, 194.58, 194.59 and

194.63, F. S., provide for the cancellation of tax sale certificates under several circumstances. Although some of the above sections of the statute provide for the destruction of a cancelled certificate (§194.27, F. S.) or for the delivery of the cancelled certificate to the owner (§194.31, F. S.), most of the said sections merely make provision for the cancellation but are silent as to any destruction of the certificate.

If the tax sale certificates are in any way public records after cancellation it would seem that they may not be destroyed without legislative authority (45 Am. Jur. 425, §12). We are unable to say that the cancelled tax sale certificates would have no value whatsoever as public records, although there may be dicta to this effect in *People v. Peck*, 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, text 386, however, we do not think that such dicta is strong enough to permit us to answer the above question in the affirmative.

The above question should be answered in the negative. It is our suggestion that §28.30, F. S., be amended so as to extend it to cancelled tax sale certificates.

057-95—April 15, 1957

TAXATION

APPLICATION FOR TAX DEED BASED UPON SUBSEQUENT OMITTED TAXES WHEN TAX SALE CERTIFICATE BARRED BY LIMITATIONS—§§192.21, 194.08, 194.15, 194.21, 196.12, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where the enforcement of a tax sale certificate is barred by §196.12, F. S., may the subsequent omitted taxes be relied on as a basis for a tax deed application?

We gather from your file, handed us with the above request for opinion, that the holder of a 1936 tax sale certificate, to which was attached subsequent omitted taxes for 1936-1940, inclusive, wishes to apply for a tax deed based upon such tax sale certificate and subsequent omitted taxes. It is also our understanding that the holder of such tax sale certificate and omitted taxes is also the holder of a 1942 tax sale certificate, and the subsequent omitted taxes for 1942, encumbering the same land. The said 1936 tax sale certificate is now more than 20 years old, and the holder purchased it, together with the omitted taxes for 1936-1940, in 1943, or more than five years ago. The said 1936 tax sale certificate is clearly barred by the limitations of §196.12, F. S. However, the 1942 tax sale certificate is not so barred.

A reading of §§194.15, et seq., F. S., relating to applications for tax deed sales and tax deeds clearly contemplate an application based upon a tax sale certificate and not merely upon the lien of taxes under §192.21, F. S. The tax sale certificate of 1936, being barred by the limitations of §196.12, F. S., may not be made the basis for a tax deed sale and tax deed. Although an applicant for a tax deed sale and tax deed is required to pay or purchase all other outstanding tax sale certificates and delinquent taxes encumbering the lands, nowhere in the statutes do we find any provision for a tax deed sale and tax deed based upon delinquent taxes not evidenced by a tax sale certificate. An applicant for a

tax deed sale and tax deed is required to "pay to the clerk the proper amount fixed by law for the redemption or purchase of all other outstanding tax certificates covering said lands . . ." (§194.15, F. S.). In order to prevent a tax deed sale, after a proper application has been filed, "the amount required to redeem the tax sale certificate or certificates, plus the amount paid by the holder thereof to the clerk of the circuit court in fees, cost of sale, redemption of other tax certificates on the same lands . . ." (§194.21, F. S.). No mention is made in these sections of the statutes to subsequent omitted taxes; however, to purchase or redeem a certificate the applicant is required to pay to the clerk "the amount of the certificate to be redeemed (or purchased) . . . and any and all subsequent omitted or unpaid taxes due on said land . . ." (§§194.08 and 194.15, F. S.). We are of the view that the subsequent omitted or unpaid taxes, when purchased in connection with a tax sale certificate, become a part thereof, so that they may not be used as basis for a tax deed sale and tax deed application when the tax sale certificate itself is barred by limitations.

The above question is answered in the negative; neither may such subsequent omitted taxes be considered in connection with an application for tax deed sale and tax deed based upon a subsequent tax sale certificate. For example, the subsequent omitted taxes to the 1936 tax sale certificate may not be taken into consideration in connection with an application based on the 1942 tax sale certificate. We have not considered the question of considering the subsequent omitted taxes to the 1936 tax sale certificate in connection with an equitable foreclosure of the 1942 tax sale certificate; we have only considered the matter in connection with applications for tax deed sales and tax deeds.

057-96—April 16, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
APPLICATION OF §125.08, F. S., AND SIMILAR STATUTES
AND LAWS TO CONTRACTS FOR PRINTING—CH. 29436, 1953,
AND CH. 283, F. S.**

To: Board of County Commissioners for Pinellas County, Clearwater

QUESTIONS:

1. Does §125.08, F. S., and laws such as §5, Ch. 29436, 1953, regulate contracts for public printing for the county and its agencies?

2. If the 1st question is answered in the affirmative, then was the printing contract between the Largo Sentinel and the Pinellas county fair and horse show valid or invalid?

Under §125.08, F. S., "no contract shall be let by any board of county commissioners of any county having a population of more than thirty-nine thousand according to the last past federal census for the working of any road or street, the construction or building of any bridge, the erection or building of any house, nor shall any goods, supplies or materials for county purposes or use be purchased when the amount to be paid therefor by the county shall exceed one thousand dollars, unless notice thereof shall be advertised once each week for at least two weeks in some news-

paper of general circulation in the county, calling for bids upon the work to be done or for the goods, supplies or materials to be purchased by the county" (Emphasis supplied.) Like provisions are contained for counties of less population with different limitations as to amount. The above quoted portion of the statute seems applicable to Pinellas county, as does Ch. 29436, 1953, §5 of which provides that "all purchases in excess of \$1,000 or such other amount requiring published notice of sealed bids as is fixed by the laws of the state of Florida, shall be made pursuant to the laws of Florida." It seems clear from this provision that §125.08, F. S., remains in force in Pinellas county notwithstanding said Ch. 29436.

It seems clear that §125.08, *supra*, applies to the purchase of "goods, supplies and materials for county purposes and use." Chapter 29436, *supra*, provides for the establishment of a purchasing agent for Pinellas county, who shall operate under rules and regulations to be promulgated and adopted by the board of county commissioners, and makes the said act applicable to purchase of "all materials, machinery and supplies of any character whatsoever to be used by the government of Pinellas county, state of Florida." (Emphasis supplied.) The two statutes seem to deal with the purchase of goods, machinery, materials and supplies. Although printed items such as newspapers, magazines, and other printed items for sale as such would seem to be within the phrase of "goods, wares and merchandise" and similar terms, we do not think that contracts for printing as such is a contract for the purchase of goods (see the definitions of "goods and chattels," "goods and effects," and "goods, wares and merchandise," in 38 C. J. S. 942-946, including the footnotes). It seems clear that the term "machinery" does not include printing contracts. After a study of the definition of the term "material" or "materials" as used in statutes of the nature of §125.08, *supra*, in 57 C. J. S. 448-450, and in 29A Words and Phrases, 294, et seq., we find nothing therein which would seem to classify printing contracts as a material or as materials. Likewise, after a study of the definition of the term "supplies" as used in such statutes, in 46 Words and Phrases, 787, et seq., and 83 C. J. S. 902-905, we find nothing therein which would seem to classify printing contracts as a supply or supplies.

It was held in *Otter Tail Power Co. v. Elbow Lake*, 234 Minn. 419, 49 N. W. 2d 197, 27 A. L. R. 2d 906, text 915, that a statute prohibiting acceptance by a municipality of a bid involving the purchase of supplies and equipment, in the absence of competitive bids, was a restrictive statute and should not be extended by construction beyond the language used. Contracts for printing have been held not to be within statutes relating to work, labor and materials (Annotation n 92 A. L. R. 837). In *Dolker v. Board of Freeholders*, 90 N. J. L. 473, 101 A. 370, it was held that a contract for the publication of an official advertisement in a newspaper by a municipality was not a contract for work, labor or materials within a statute. In *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 36, it was held that paper, ink, cuts and the like were not within a statute providing that a mortgage was not to be considered as prior and superior to a claim for labor and materials furnished that is, that such paper, ink, etc., was not to be classified as labor and materials furnished. In *Bell v. St. Johns-*

bury and Lake Champlain Railroad Co., 76 Vt. 42, 50 A. 105, text 109, stationery and printing for a railroad in receivership was held not to be "services rendered or materials furnished . . . to keep the railroad . . . in repair and running," so as to be within a statute giving a preference for such services rendered or materials furnished.

It, therefore, appears that printing for a county or its agencies is not within the purview of §125.08, F. S., or §5, Ch. 29436, 1953, and the 1st question should be answered in the negative.

The 1st question having been answered in the negative, it becomes unnecessary that the 2nd question be answered.

Although Ch. 283, F. S., does not embrace county printing, we feel that a board of county commissioners and county officers and agencies, where there is no specific statutory rule otherwise applicable, would be safe in following the rule established for class "B" printing by Ch. 283, F. S. The printing contract here involved seems to have substantially complied with this rule.

057-97—April 18, 1957

LEGISLATION

LEGAL EFFECT OF LEGISLATIVE RESOLUTION OF INTERPOSITION

To: Scott Kelly, State Senator, Tallahassee

QUESTION:

What is the meaning and legal effect of a legislative resolution of interposition?

At the outset, I call your attention to an opinion dated Feb. 14, 1956, written by Hon. J. Lindsay Almond, Jr., attorney general of Virginia, to a member of the house of delegates of Virginia. This opinion discusses in considerable detail the issues raised by your question. A copy of the opinion is attached for your information.

I concur in substance with the opinion issued by Attorney General Almond. Specifically, I concur with the following statements in his opinion:

"The resolution does not purport to operate as a suspension of or supersedeas to the decision as it relates to the defendants in the Federal District Court." ". . . However, the resolution is an unequivocal epitome of Virginia's unyielding devotion and loyalty to the perpetuation of that constitutional system of government which, more than any other state, she molded and launched in the formation of the Union and the building of an enduring foundation to support the superstructure of the Nation. It is predicated on principles woven ineradicably into the very fabric of the Nation's life. It represents the overwhelming solidarity of a great people in their attachment of heart, mind, and conscience to deep rooted convictions which they cannot compromise. *It is indisputable evidence of the supreme gravity of the manifold problems created by the Supreme Court far transcending considerations of race.*" (Emphasis supplied.)

"The resolution is not a legislative enactment having the force and effect of law. It is a solemn and deliberated declaration of right, impelled by the sacred obligation of duty, asserting and interposing the sovereignty of the State to arrest illegal encroachments and to

preserve 'the authorities, rights and liberties' which Virginia has never surrendered"

" . . . Representing the all but unanimous resolve of the elected representatives of the people, it imposes upon all officials, State and local, the duty to observe 'all appropriate measures honorably, legally and constitutionally available to resist this illegal encroachment upon the sovereign powers of this State.'"

"The resolution is far more than a 'stern protest and a memorial.' It does not seek to accomplish that which is merely desirable. . . ." "The resolution under consideration is a declaration of right invoking and interposing the sovereignty of the State against the exercise of powers seized in defiance of the creating compact; . . . *It is an appeal of last resort against a deliberate and palpable encroachment transgressing the Constitution.*" (Emphasis supplied.)

I concur in the above quoted excerpts from Attorney General Almond's opinion. Restating and amplifying these statements, it is my opinion that although a resolution of interposition is not a statutory enactment having the force and effect of law which purports to supersede or overrule the authority of the federal judiciary, it is clear-cut and admissible evidence of an existing factual situation in Florida which makes it impossible to implement the decision of the United States supreme court in the Brown case.

This distinction is best illustrated by the majority opinion of the Florida supreme court filed March 8, 1957, in the case of Hawkins v. Board of Control (Fla.), 93 So. 2d 354.

In said case the U. S. supreme court had in effect directed the Florida supreme court to issue its peremptory writ of mandamus to compel the admission of Hawkins (a Negro) to the university of Florida college of law.

The Florida supreme court did not dispute the authority of the U. S. supreme court to determine the right of Hawkins to attend the university of Florida. It did, however, in its opinion make it clear that in its (the Florida court's) judgement, the issuance of the writ at this time would cause serious public mischief — that it could not be issued without doing great harm to the university of Florida and jeopardize the public peace. Because of this *factual situation*, the Florida court refused to issue an order admitting Hawkins to the university of Florida at this time or to set any specific time for his admission.

The Florida supreme court said: " . . . We cannot assume that the Supreme Court intended to deprive the highest Court of an independent sovereign state of one of its traditional powers, that is, *the right to exercise a sound discretion as to the date of the issuance of its process in order to prevent a serious public mischief.* (Emphasis supplied.) As recently as June 4, 1956, in *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, et al.*, the Supreme Court (of the U. S.) recognized the 'dominant interest,' of a state in preventing violence. It there said: 'The states are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect.'"

The Florida supreme court then said, "We are cognizant of our

duty to compel Relator's admission to the University of Florida Law School without delay, if it is feasible to do so at this time; *but we have an equally compelling duty to perform in respect to the public peace and a long-established state judicial procedure by which to perform it.*" (Emphasis supplied.)

We have quoted at length above from the Hawkins case because we feel that it is an important assertion and delineation of the power and duties of a state supreme court in relation to the federal judiciary. Our court did not defy or ignore the U. S. supreme court; it simply said what everyone knows to be true, that the U. S. supreme court's decision could not be carried out as matters now stand without doing serious public mischief. It also took cognizance of the duty of our state judiciary as an arm of the state government to interpose itself where necessary to protect the welfare and peace of the people of Florida.

Even though the doctrine has been accepted that the judicial "power" of the U. S. supreme court is supreme, that does not make each of its decisions intrinsically and unquestionably right. States' rights may have to yield to naked federal power but they are nonetheless in moral, historical and philosophical contemplation as unsailable as they were when first reserved.

We think the same duty to an even greater extent is imposed on our state legislature since it is the policy-making branch of our state government.

Our state legislature is the proper forum for an expression of the will of a majority of our people.

We are convinced as a result of two statewide surveys, one conducted by this office in 1954 and another by the state board of control in 1956, that it is impossible to integrate the public schools and colleges of Florida without completely disrupting our schools and endangering the public peace. This conclusion has been confirmed by the results of the elections of virtually every public official who has stood for office since 1954. The electorate has expressed itself overwhelmingly in favor of officials who made public assurances that they would support all legal measures to support segregated schools.

This being the case, we do not think it amiss for the legislature of Florida to express the will of the great majority of our citizens in a resolution which does not constitute the enactment of a law attempting to supersede federal laws or court decisions, but which is a finding of fact that cannot be ignored. Even if power-wise it has no efficacy; it may have some moral suasion as an honest, sincere expression of the feeling of the people's representatives in behalf of a sovereign state.

Such a finding of fact demonstrating the impossibility of integrating schools at this time should be properly admissible in any court, federal or state, and should be considered by such courts in determining the equities, the realities and the hardships of the situation.

At this point we think it proper to point out the fallacy of arguments recently made that the enactment of a resolution of interposition would jeopardize our Florida school assignment law.

I was most concerned and resented the accusation by the opponents of interposition that such measure would jeopardize our legal position in segregation litigation. In my memorandum to

the legislative committee, I thought I pointed out rather clearly that the Virginia federal district court case, which the opponents of interposition rely on, did not determine the unconstitutionality of the pupil placement act by the interposition resolution. This is clearly indicated by the following statement of the court:

The passage of the resolutions to which reference has been made is not, however, determinative of the final issues in these cases now pending.

The district court in the above case held the Virginia act unconstitutional on its face and had no other choice but to do so inasmuch as the Virginia law provided for the automatic cessation of public school facilities upon the admission of a Negro to a white school.

The school assignment law did not originate in Florida and it is not unique in any respect among similar laws adopted in other southern states with varying degrees of success. Its validity under the Brown decision will be determined solely by its application. If it is not used to prevent integration, I think it will be held valid. If it is used as a means of separating school children because of race, it will be held invalid. To say that the courts will consider it in pari materia with a resolution of interposition enacted at a subsequent session of the legislature is ridiculous and a reflection on the intelligence of our courts.

It does not require a legal opinion to understand the superficiality of an argument which says in essence that the courts will recognize the validity of a school assignment law which will maintain segregated schools so long as we can keep our intentions a secret and keep the courts from finding out that our real purpose is to keep segregation.

This argument assumes that the courts will make no inquiry into the results of the law's application unless we do something to let the "cat out of the bag" and reveal our real motives by stating frankly and honestly the current factual situation in Florida by the enactment of an interposition resolution.

We do not agree with the U. S. supreme court in its Brown decision but we do not think the members of the federal court are stupid. The federal district judge who now has jurisdiction of the school cases in Palm Beach and Miami has been mentioned frequently in these arguments against interposition. These arguments openly advocate that this judge must be kept in the dark as to the effectiveness of the school assignment bill in maintaining segregation by not adopting an interposition resolution. We do not think this judge will be impressed by an ostrich-like attitude such as this. We think he will consider the law solely on its merits and in the light of its factual application, regardless of other considerations.

The position of this office regarding public school segregation, the U. S. supreme court's decision, interposition or other relevant legislation has not been altered or modified since we appeared as amicus curiae in the Brown case before the U. S. supreme court in 1954.

At that time and now we take this position:

We think, first, the Brown decision was in error from a legal standpoint but it is binding upon state courts unless, (a) the court reverses itself or modifies its decision. This we do not think likely to happen as the court is presently constituted. Or, (b) the federal constitution is amended in such a way as to alter the

provisions of the existing constitution upon which the court relied in its interpretation of the law.

Second, we believe that the decision of the supreme court in the Brown case *cannot* be implemented in Florida at this time because an overwhelming majority of our people will not comply with the decision by sending their children to integrated schools. We told the court this as forcibly as possible and backed it up with evidence resulting from an impartial survey made by this office in cooperation with school officials in the state department of education and in our universities. Apparently this evidence had some effect since the U. S. supreme court did not enter an order requiring immediate integration or setting a specific time for integration but left it up to courts of first instance to determine when implementation of the court's decision could be carried out.

Third, I conceive it my duty as attorney general of the state to be responsive to the will of a majority of our people in so far as it is morally and legally possible to do so. We believe that it is our clear duty to face the facts now confronting us realistically, logically and courageously.

We do not believe that it is honest or morally right to mislead our people with half-truths, evasions or any other statement which does not present the facts and law accurately as they now exist. We do not believe that either interposition or school assignment laws offer a cure-all or magic solution as statutory enactments which can circumvent the U. S. supreme court as a matter of legal right. We think the school assignment law is legally valid if properly administered and that it may slow down the process of integration but will not stop it. We think that interposition, although not a legal defense as a matter of law, does have moral validity and does serve a practical purpose as evidence (which will carry more weight than surveys) of the practical impossibility of forcibly requiring public schools in Florida to be integrated at this time and as a responsible factual representation which may be cited of necessity in the public interest of withholding judicial decrees requiring integration as our Florida supreme court did in the Hawkins case.

Fourth, we think the time has come for responsible public officials, including the legislature and school officials, to abandon wishful thinking on these issues and to recognize the truth of our statement to the U. S. supreme court in 1954 that "... there is no reason to believe that this (integration) can be accomplished hurriedly or through the legal coercion of school officials who would thus find themselves caught in the impossible dilemma of confronting on the one hand the irresistible force of a judicial edict which must be obeyed and on the other hand the immovable object of public opinion which cannot be altered."

Fifth, we think our people should not be lulled into a false sense of security or led to believe that somehow the matter will be "worked out" or "the problem will go away" if we just ignore it. The fact is, our school system is now on the brink of disaster and there is every reason to think it may soon topple over this brink if the courts attempt to require integration in most Florida communities at this time.

We know of no remedy to offer other than to continue to make every effort to convince the federal courts that integration is impossible unless and until the people themselves in their respective

communities will accept it. If these efforts fail and the courts do attempt to integrate schools in communities which will not accept it, we think it the duty of all three branches of our state government to follow the example of our Florida supreme court in the Hawkins decision and to use their honest discretion in the public interest, and to act under the police powers of the state to preserve law and order and to preserve public education if possible.

In conclusion, it is my opinion that a resolution of interposition has validity and practical value as an official expression of the legislative branch of the state of the following things: (1) It is the conviction of the majority of our people that the U. S. supreme court exceeded its constitutional authority in its interpretation of the federal constitution in the Brown case; (2) That compliance with the supreme court's decision in said case in Florida is a factual impossibility at this time and that therefore Florida schools will not be integrated even though they are required to do so by court order.

057-98—April 19, 1957

TAXATION

HOMESTEAD TAX EXEMPTIONS; LIFE ESTATES AND REMAINDERS; §7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a remainderman in possession of real property claim homestead tax exemption prior to the termination of the life estate?

During the month of April, 1956, the owner, seized and possessed of certain real property in this state, conveyed the said lands by warranty deed, properly executed and acknowledged, to another, "her heirs and assigns forever," subject to restrictions and easements of record. We are not advised of the said restrictions and easements, if any. The said deed contained the following: "The grantor herein reserves unto herself a life estate in and to the above described property." The interest of the grantee under the above conveyance seems to be a vested remainder (33 Am. Jur. 525, §66; 31 C. J. S. 88, §69). "A remainderman whose interest is vested does not have actual or constructive possession of the property, but simply an estate *to vest in possession* in the future" (33 Am. Jur. 527, §67). A remainderman is entitled to neither actual nor constructive possession of the property until the termination of the preceding particular or life estate (31 C. J. S. 97, §85).

With regard to homestead exemptions from execution and other process, for a debtor to claim homestead exemption he must have some *possessory interest* in the land claimed (40 C. J. S. 520, §80) and by the great weight of authority a future estate, whether *vested* or *contingent*, will not support a claim of homestead exemption during the continuance of the prior or life estate (40 C. J. S. 522, §82) there being no right of present occupancy or possession. This rule seems to apply "even though the remainder or reversionary right is permitted to live on the premises with the holder of the prior estate." (40 C. J. S. 523, §82). This seems to lead to the conclusion that the grantee in the deed above described has no right of possession under the conveyance in question.

If the grantee in the said deed is in possession of the property such possession must be based on some right of occupancy claimed under the life tenant. We are not advised as to the right under the life tenant, if any, and do not here pass upon it as a basis for a homestead exemption claim. Section 7, Art. X, State Const., contemplates that the "legal title or beneficial title in equity to real property in this state" therein mentioned be such as carries with it the right to occupy the said premises.

We must, therefore, answer the above stated question in the negative *upon the record before us*, for want of a right to possession in the grantee under the deed before us until the termination of the life estate.

057-99—April 22, 1957

COUNTY SCHOOL SYSTEM

CONSTRUCTION OF PARKING SPACES ON SCHOOL PROPERTY—§§235.36, 339.23, AND 193.32(3), F. S.

To: G. C. Perdue, County Attorney, Bronson

QUESTION:

Does a board of county commissioners have authority to use road and bridge funds of the county to construct byways and roads which will provide public access, including parking facilities on lands owned by the county school board if such roads and facilities connect with an existing public road but are otherwise completely confined to the school property?

Section 235.36, F. S., provides:

County commissioners may improve roads and sidewalks.—The boards of county commissioners of the state may pave and maintain any road, byway, or sidewalk, adjacent to, or running through, the property belonging to any school district or other public free school of any county in the state, where the material and equipment is available for such paving, or maintenance; and it is declared that such paving, or maintenance, of such roads, byways or sidewalks, is a public county purpose; provided, that such action upon the part of the boards of county commissioners is not required by this section to be mandatory but discretionary.

It is my opinion that pursuant to the quoted statute your question should be answered in the affirmative if the county commissioners by appropriate resolution determine that the road, byways and incidental roadway facilities such as sidewalks and parking facilities would unquestionably serve the needs of the motoring and pedestrian public in relation to their access to some public school facility. The language is broad enough to contemplate such prescribed road facilities whether the same are to be constructed adjacent, into or across areas used for county school purposes. No technical restrictions in regard to their layout is indicated in the statutes.

The special tax levied by §339.23, F. S., may be used for "work on public roads and bridges. . ." or for equipment to work on such roads and bridges. Section 193.32 (3), F. S., provides not more than 10 mills for the "general road and bridge fund." Of

course these two statements are to be read in *pari materia* with §235.36, F. S., discussed above. Funds which may be budgeted to accomplish the purpose contemplated in your question should be allocated by usual budgetary or budget amendatory proceedings.

057-100—April 24, 1957

LEGISLATION

1955 AMENDMENT TO ARTICLE XII, EDUCATION—CONSTRUCTION OF PROVISIONS OF REFERENDUM CLAUSE

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

The newly adopted amendment to the Florida constitution (Art. XII), relating to abolition of school trustees, contains the following language: "... wherein the proposition is affirmed by a majority vote of the qualified electors of any such county." Does this language mean that for a referendum to carry and become effective, a majority of all the qualified electors residing in the county must affirm the proposition?

This question was considered by the Florida supreme court in the case of *Harris et al. v. Baden* (17 So. 2d 608), 1944. In said case the contention was made that the act in question never became operative as law because it was not approved and ratified by a majority of the qualified electors of the territory described in the act, even though it had been ratified by a majority of the electors who voted in the election.

The court said: "We do not agree. We are of the opinion that the term 'a majority of the qualified electors of the territory described in Section One of this Act at an election to be held on the first Tuesday in August, 1943,' means a majority of the qualified electors of the territory who actually voted upon the measure at election day, not a majority of the voters who may have had the right to vote. Electors who are qualified to vote at an election and yet do not avail themselves of this privilege are deemed to have assented that the question shall be determined by those who do vote. *Bell v. City of Ocala*, 62 Fla. 431, 56 So. 683; *Pickett v. Russell*, 42 Fla. 116, 28 So. 764; *State ex rel. Lanier v. Sumter County Commissioners*, 19 Fla. 518; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517."

See also 18 Am. Jur., page 340, par. 243:

Basis of Computing Requisite Number or Proportion.

—In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result. This is true whether the matter is submitted at a meeting under a statute requiring the assent of a majority of all the inhabitants entitled to vote, to be ascertained by taking and recording the ayes and nays of such inhabitants attending

the meeting, or whether it is submitted to a decision of a majority of the voters at the polls. Thus, a law requiring a question to be decided or an officer to be elected by the votes of the majority or other proportion of the voters does not require that the majority or other proportion of all the persons entitled to vote actually vote affirmatively, but only that the result be decided by a majority or other specified proportion of the votes cast.

In view of the above, it is my opinion that your question must be answered in the negative. In other words, the election would be determined by a majority vote of the electors actually voting in the election.

057-101—July 29, 1957

TAXATION

DOCUMENTARY STAMP TAXES—CORPORATE STOCK—
EXCHANGES—REORGANIZATION—§§201.04
AND 201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. A Florida corporation with an authorized capital of 1000 shares of no-par value stock, of which 104 shares were outstanding, amended its charter and increased its authorized capital to 104,000 shares of no-par value stock, and, upon the completion of said amendment, called in the said 104 shares of outstanding stock and issued in lieu thereof 104,000 shares of said no-par value stock. Were the 104,000 shares of stock, or any part thereof, subject to taxation under §201.05, F. S.?

2. Where the owners of the said 104 shares of no-par value stock surrendered the same in exchange for 104,000 shares of said stock, instructing that the reissued stock be issued and delivered to another, was such transaction subject to taxation under §201.04, F. S.?

The above stated questions involve §§201.04 and 201.05, F. S., and require a construction of said sections and their applications. *First*, the tax imposed by §201.04 is upon the sale or transfer of corporate stock, which transaction by its nature takes place after the original issuance of the corporate stock, whether issued pursuant to organization or reorganization. *Second*, the tax imposed by §201.05 is upon the original issuance of the stock, whether pursuant to organization or reorganization.

Section 201.05, F. S., provides that "*on each original issue, whether original or reorganization, of certificates of stock, issued in the state, or profits, or interests in property or accumulations, by any corporation on each one hundred dollars of face value, or fraction thereof, the tax shall be ten cents; provided, that where a certificate is issued without par value, the tax shall be ten cents per share, unless the actual value is in excess of one hundred dollars per share, in which case the tax shall be ten cents on each one hundred dollars of actual value or fraction thereof.*" Section 201.04, of said statutes, in so far as here material, provides that, "*On all sales, agreements to sell, or memoranda of sale or deliveries, transfers of legal title to shares or certificates of stock or profits or*

interests in property or accumulations in any corporation or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interests rights or not, on each one hundred dollars of face value, or fraction thereof the tax shall be ten cents; and *where such shares are without par value the tax shall be ten cents on the transfer, or sale or agreement to sell each share . . .*" (Emphasis supplied.) Said §§201.04 and 201.05, were derived from two sections of Ch. 15787, 1931, which appear to have been taken largely from a federal statute upon the same general subject (Act of Feb. 26, 1926; 44 St. 99) now appearing, in so far as here material, as §§4301-4305, title 26, U. S. code.

Because of the similarity between the state and federal statutes, opinions of the federal courts upon the said federal statutes are material aids in construing the said state statutes (Gay v. Inter-County Tel. and Tel. Co., Fla., 60 So. 2d 22, text 23; State v. Cook, 108 Fla. 157, 146 So. 223, text 224). Although §201.05, F. S., is substantially identical with the first part of the corresponding federal statute, the federal statute contains the following language not found in the Florida statute, to wit, "or unless the actual value is less than one hundred dollars per share, in which case the tax shall be one cent on each twenty dollars of actual value or fraction thereof," which language would seem to distinguish the two statutes.

This office, on July 25, 1934 (1933-4 Biennial Report 39-40) held that the "measure of the tax is the face value of the *certificate of the stock* regardless of the number of *shares* it represents, and this applies to stock 'with face value' and stock 'without face value.'" The basis for this opinion appears to have been Commercial Credit Co. v. Tate, DC Md., 2 Fed. 2d 862 (affirmed without opinion in 7 Fed. 2d 1022); however, we note from the court's opinion (2 Fed. 2d 864), a statement that "the expression 'That where a certificate is issued without face value, the tax shall be five cents per share,' is precise and definite, and, if there were no more, it would be clear that the tax was assessed on the share and not on the certificate . . ." The decision of the court seems to have turned on the phrase "or unless the actual value is less than one hundred dollars per share, in which case the tax shall be one cent on each twenty dollars of actual value or fraction thereof," which was omitted from the Florida statute. We are, therefore, of the opinion that the holding of the federal court in Commercial Credit Co. v. Tate, supra, had no application to the Florida statute, because of the omission from the Florida statute of a material provision found in the federal statute. The question seems to require re-examination and a further determination.

It seems significant that the first part of §201.05, F. S., provides for a tax "on *each original issue . . . of certificates of stock . . . on each one hundred dollars of face value or fraction thereof,*" of ten cents; while the latter part of said section provides for a tax, "where a certificate is issued without face value," in which case "the tax shall be *ten cents per share*, unless the

actual value is in excess of one hundred dollars per share in which case the tax shall be ten cents on each hundred dollars of actual value or fraction thereof." (Emphasis supplied.) Only when the actual value of the no-par value stock is in excess of one hundred dollars per share do the taxes imposed by §201.05, F. S., have any relation to actual value. When the actual value of no-par value stock is less than one hundred dollars per share the tax imposed is *ten cents per share* without regard to actual value of such shares. The tax on no-par value stock is based on *the number of shares in the certificate*, while the tax on par value stock is based on *the value of the certificate*. We are advised that the state comptroller, so far as is now known to personnel of that office, has never followed the said opinion; as a matter of fact the enforcement of the statute by the comptroller's office has been contrary and opposite of the rule of the said opinion. It seems to be indicated by the omission of the latter part of the federal statute from the Florida statute, that the Florida legislature was not satisfied by the terms of the latter part of the federal statute and omitted it. The Florida legislature appears to have adopted the number instead of the value of no-par value stock as the basis of the tax imposed by it. The imposition of the tax in *Gay v. Inter-County Tel. and Tel. Co., Fla. 60 So. 2d 22*, appears to have been based upon *the number of no-par value shares* transferred and not upon the actual value of the shares in each certificate.

We have examined the record and opinion in *Gay v. Inter-County Tel. and Tel. Co., supra*, and find that the company was organized in 1924 with par value capital stock; however, in 1925 the capital structure was changed by amendment, substituting an authorized capital of 5,000 shares of no-par value stock for the said par value stock. The charter was further amended so as to authorize a total capital of 10,000 shares of no par value stock, all of which stock had been issued and was outstanding when the documentary stamp tax law was enacted in 1931 (Ch. 15,787, 1931, now appearing as Ch. 201, F. S.). "From the effective date of the documentary stamp tax act to Aug. 14, 1941, there were transferred upon the books of the corporation certificates of shares of stock of the aggregate number of 25,000 . . . these transactions did not constitute an original issue of stock but did constitute the transfers of stock certificates and all of these transfers were shown upon the books of the company." (*Gay v. Inter-County Tel. and Tel. Co., supra*). At the time of the recapitalization of the company in 1941, these shares of no-par value stock had a stated or fixed value of \$45 per share. The said transfers of 25,100 shares of stock were evidenced by the issuance of 27 certificates of stock (Nos. 47-75 inclusive) such certificates transferring from 10 to 4940 shares each. The tax imposed on the said 25,100 shares of stock was \$2,510; had the tax been assessed on the value of the stock in the certificates instead of the number of shares it would have been about \$1,130.50 instead of \$2,510. Between the recapitalization in 1941 and the bringing of the suit, in *Gay v. Inter-County Tel. and Tel. Co., supra*, there were either issued or transferred, by the use of 13 certificates, a total of 39,532 shares of \$25 par value stock (common and preferred) upon which a total tax of \$988.80 was levied and assessed, which \$2,510 and \$988.80 in taxes, plus \$1.90

tax on powers of appointment make up the total tax of \$3,500.70 imposed by the courts in the case of *Gay v. Inter-County Tel. and Tel. Co.* It clearly appears from the *Inter-County Tel. and Tel. Co.* case that the tax imposed upon the transfer of the no-par value stock therein was calculated on the basis of ten cents per share (the value per share being less than one hundred dollars) and not on the value of the total shares in each stock certificate transferred.

Under the statute the tax imposed upon transfers of no-par value stock is measured by the number of shares transferred and not the total value of the shares transferred (see §201.04, F. S.). The same rule is applicable under §201.05, F. S., for the original issuance of no-par value stock. In each case the tax is on the number of shares transferred or issued, at the rate of ten cents per share, where the actual value is one hundred dollars or less, and where the value exceeds one hundred dollars the tax is ten cents on each one hundred dollars of value or fraction thereof. It, therefore, seems that the opinion of July 25, 1934 (1933-4 B. R. 39-40) and all other like opinions of this office should be and they are hereby overruled and disapproved.

This brings us to the question of the exchange of the no-par value stock issued before the amendment to the corporate charter (104 shares) for the no-par value stock issued pursuant to the amendment (104,000 shares). It seems evident from the file that there was no increase of capital upon the recapitalization and the issuance of the 104,000 shares in exchange for the 104 shares. There is a line of authorities holding that where corporate stock is surrendered, in exchange for other stock of the same corporation, without there being any change in the capital structure of the corporation, that the issuance of the exchange stock is not taxable as an original issue, especially where the exchange merely amounts to a split-up of stock and there is no increase in the capital structure of the corporation (Annot. in 170 A. L. R. 690-697). This rule has been applied to both par value and no-par value stock where the tax was based upon the total value and not the number of shares in a stock certificate; however, so far as we have been able to ascertain, there is no reported case involving a statute making the number of shares, and not the total value of the shares, the basis for the tax as do the Florida Statutes, holding in line with the said annotation. No such case appears from the said annotation. In this state the tax on no-par value stock, whether original issue or transfer, is measured by the number of shares and not the value of the shares.

Under the Florida Statutes the tax on 100 shares of par value stock having a par value of one thousand dollars per share, would be the same as 100,000 shares of par value stock having a par value of one dollar per share; this because the tax on par value stock is measured by the total value of the shares and not the number of shares. However, the tax on 100 shares of no-par value stock, having an actual value of one thousand dollars per share, making a total value of one hundred thousand dollars (tax of one hundred dollars), would not be the same as the tax on 100,000 shares of no-par value stock, having an actual value of one dollar per share, having an actual value of one hundred thousand dollars (tax of ten thousand dollars). This leads to

doubt as to the application of the rule announced in said Annot. in 170 A. L. R. 690-697 to no-par value stock under the Florida Statutes. The federal cases on the same point are likewise not in point because of the difference between the Florida and the federal statutes, as above pointed out. We must, therefore, hold that the said rule announced in said annotation in A. L. R. has no application to no-par value stock under the Florida Statutes. Where only one hundred shares of no-par value stock has been issued by a corporation, and such stock is surrendered in exchange for 100,000 shares of no-par value stock, without any increase in the capital structure of the corporation, there is an increase in the number of no-par value shares outstanding although there is no increase in capital. If one corporation should issue 1,000 shares of no-par value stock, having an actual value of one hundred dollars per share, the tax would be one hundred dollars; while if another corporation should issue 10,000 shares of no-par value stock, having an actual value of ten dollars per share, the tax would be one thousand dollars. The capital of the two corporations would be the same, although the tax would differ. If the rule in A. L. R. above mentioned was applicable, one might organize the corporation with one thousand shares of no-par value stock with an actual value of one hundred dollars per share (tax one hundred dollars) one day and amend the corporate charter the next day raising the authorized number of no-par value shares to 10,000 shares, exchange the 1,000 shares for the 10,000 shares, thereby evading taxation. We do not think that the legislature, when it enacted Ch. 201, F. S., intended to authorize any such proceeding. In this case there would be an additional original issue of 9,000 shares.

The tax imposed by §201.05, F. S., is imposed upon "each original issue, whether organization or reorganization." This statute recognizes two classes of originally issued corporate stock; that issued on original organization, and that issued in connection with reorganizations of the corporation. We have examined copies of the special meeting of the board of directors of the North American Co. of Sept. 6, 1954, wherein we find "the only item on the agenda was the consideration by the Board of Directors of the adoption of a *plan of reorganization* concerning itself and its parent company, the R. H. Gore Company, an Illinois corporation, the sole owner of all its corporate stock, which *plan of reorganization* called for the North American Company changing its corporate stock so that the maximum number of shares of nominal or par value which the corporation would be authorized to have outstanding at any time would be 104,000 shares of common stock of no par value" The board of directors at the said meeting adopted a resolution wherein and whereby it was "resolved by the Board of Directors of the North American Company that the *plan of reorganization* involving this company and its parent company, the R. H. Gore Company, an Illinois corporation, calling for the distribution of such stock to the stockholders of the R. H. Gore Company in the same proportion as they the stockholders own stock in the R. H. Gore Company, with the R. H. Gore Company in return *turning in its present stock of cancellation . . .* ." The said resolution further provided for the calling of a stockholders meeting "to consider the further approval of such *plan of reorganization*."

From copies of the minutes of the stockholders meeting of Sept. 6, 1954, it appears that "after a short discussion and deliberation in which the proposed plan of reorganization was thoroughly analyzed and considered," a resolution was adopted which, after making reference to and approving the resolution of the directors "approving a plan of reorganization between this company and its parent company . . ." it was "resolved that the above *plan of reorganization*, as above outlined, is hereby adopted and approved." In the language of the court in *Gay v. Inter-County Tel. and Tel. Co.*, supra, "there was a plan of reorganization and new stock was issued pursuant to said plan." There appears to have been no less a plan of reorganization here than there was in the *Inter-County Tel. and Tel. Co.* case. (Emphasis supplied.)

It seems clear that the plan of reorganization of the North American Co. was devised to transfer existing stock ownership from the R. H. Gore and Co. to stockholders of the said R. H. Gore Co., in the nature of a distribution of property from the said R. H. Gore Co. to its stockholders. As a part of the plan of reorganization the R. H. Gore Co. surrendered no-par value stock owned by it in the North American Co. to said company with instructions that there be issued in lieu thereof other no-par stock to the stockholders of the said North American Co. This appears to have been part of the reorganization. Further, there was a split-up of the existing 104 shares of no-par stock into 104,000 shares of no-par value stock without increasing the capital assets of the company. We, therefore, hold that the 104,000 shares of no-par value stock, issued in lieu of and in exchange for the 104 shares, was an original issue of corporate stock upon reorganization, subject to taxation under and pursuant to §201.05, F. S. There were 104,000 shares of no-par stock issued for and in lieu of the outstanding 104 shares of no-par value stock.

From the above and foregoing statutes, authorities and observations we conclude that:

1. The 104,000 shares of no-par value stock, issued in lieu of the outstanding 104 shares of no-par value stock and upon reorganization, were subject to taxation under §201.05, F. S. We see no reason why the amount of taxes actually paid upon the issuance of the original or 104 shares might not be credited upon the taxes due on the 104,000 shares, under the rules of equity.

2. If the transaction involved a transfer of the 104 shares, from the R. H. Gore and Co. to its stockholders prior to reorganization and reissuance of stock, then there would be a transfer tax due upon such transfer. However, if the transfer was made from the R. H. Gore and Co. to its stockholders, in connection with and as a part of the reorganization, by a surrender of the stock with instruction, upon the reissuance of the stock on reorganization, to issue such stock to named persons, then it is doubted that such transaction amounted to a transfer under §201.04, F. S., in addition to the reorganization transaction. The issue of the new stock in connection with the reorganization, was an original issue of stock in connection with a reorganization, under §201.05 and not a transfer under §201.04.

057-102—April 24, 1957

PUBLIC RECORDS—RECORDING

MAPS AND PLATS—CONSTRUCTION OF CH. 177, F. S.—
§§177.01-177.02, F. S.To: *Hiram Faver, Clerk Circuit Court, St. Augustine*

QUESTION:

Does Ch. 177, F. S., provide for the filing and recording of all types of land surveys, or is it limited to surveys of cities, towns and additions thereto and similar surveys usually referred to as subdivisions?

Chapter 177, F. S., was derived from Ch. 10275, 1925, the title to which was "an act to regulate the making of surveys and filing for record of maps and plats in the State of Florida." The title was broad enough to embrace surveys of land generally and there is nothing in the title limiting the recording of plats and maps of surveys to surveys of what is usually referred to as subdivision plats.

Although §177.02 relates to the records of plats or maps "whenever any city, town or addition thereto, shall be laid out or altered . . . or whenever any land shall be platted into lots and blocks, within this state," §177.01 relates to the records of plats and maps "whenever maps or plats of any land within this state are brought into a . . . public recording office to be placed on the public record" and is therefore broader in its scope and coverage than is §177.02. This leads to the decision that §177.02 is merely a class of the maps and plats embraced in §177.01. A reading of the entire chapter reveals certain provisions which seem to be applicable to subdivision maps or plats only and not to general plats or maps of land.

We, therefore, feel that Ch. 177, F. S., provides for the filing and recording of all types of land surveys, and is not limited to surveys and plats or maps of subdivisions only.

057-103—April 24, 1957

TAXATION

LICENSES—OPERATION OF CAFETERIAS AT CERTAIN
EDUCATIONAL INSTITUTIONSTo: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where an educational institution makes an agreement with a cafeteria or a caterer to operate its cafeterias or dining rooms, is such cafeteria or caterer required to obtain a caterer's license in connection therewith?

2. Where an educational institution makes an agreement with a cafeteria or a caterer to supply its dining room with a fixed number of meals per day or other period of time, which may include the serving of such meals, is such cafeteria or caterer required to obtain a caterer's license in connection therewith?

It appears from the file that an educational institution in the state "does not operate its cafeteria, instead they have . . . cafe-

teria . . . run it for them." It further appears that the educational institution pays the cafeteria a fee for running its cafeteria. It is claimed by the educational institution that the operation of the cafeteria is under its control, although it is operated by the cafeteria company, probably as agent. It appears that the cafeteria company has been billed by the tax collector for an occupational license tax as a caterer for operating a catering service.

A caterer is defined in 11 C. J. 33, as "one who furnishes everything needful for entertainment; a purveyor"; In Webster's new international dictionary, 2nd ed., as "one who caters; specif., one who provides provisions and service, esp., for entertainment at clubs, private homes, etc." Webster also defines the word "cater" as "to provide a supply of food; act as caterer." The term was defined in *Amey v. Winchester*, 68 N. H. 447, 39 A. 487, 73 A. S. R. 614, 39 L. R. A. 760, as "a person who simply provides a banquet as caterer under a contract." The term has also been defined as "a provider, buyer or purveyor of provisions." The term "purveyor" is defined by Webster as "one who purveys, provides or procures; now, usually one who provides victuals, or whose business is to make provisions for the table; a victualer; a caterer . . ."

For the cafeteria company or other person to be a "caterer" or a "purveyor" he must prepare and furnish the food ready for serving at the institution's cafeteria or eating place, which usually includes serving the same, for a fixed price. The price may be based on the number of meals furnished or served or it may be based upon some other measure. If the cafeteria company, or other person, using the kitchen of the institution and groceries purchased for the account of the institution, merely prepares the meals for a price, which may include the serving of the meals, then the relation would seem to be one of principal and agent or employer and employee, and not that of a caterer.

The 1st question is answered in the negative and the 2nd in the affirmative. No sufficient facts are before us to make a positive answer to the specific question posed by the tax collector's letter.

057-104—April 25, 1957

PUBLIC RECORDS

JUDGMENTS RECORDED IN OFFICIAL RECORD BOOKS OF CLERKS OF CIRCUIT COURT—LIENS ON REAL ESTATE—§§28.221(1)-(4), 28.21(11) AND 58.08-58.10, F. S.

To: *Jess Mathas, Clerk, Circuit Court, Deland*

QUESTION:

If a judgment is duly recorded in the minute book of the circuit court and thereafter a certified copy thereof is recorded in the official records book, would such recording constitute a lien against real estate?

Sections 1 and 2 of Ch. 28033, 1953 (§§28.221(1) and (2), F. S.), authorize the clerk of the circuit court, for the purpose of recording instruments required by law to be recorded, to keep one general series of books known as "official records" and an index thereto.

Section 3 of said Ch. 28033 (§28.221(3), F. S.), provides that

the "recording of instruments in 'official records' imparts notice in like manner and effect as if the instruments were recorded in separate books."

Section 4 of said Ch. 28033 (§28.221(4), F. S.), provides:

Certified transcripts of judgments and decrees recorded in "official records" shall become liens on the real estate of the defendants in the county where the same are recorded in the same manner as if said certified transcripts had been recorded in the judgment lien record. Chapter 28033 did not repeal §28.21(11), F. S., which provides:

A JUDGMENT LIEN RECORD and record of foreign judgments, in which shall be recorded all certified transcripts of judgments and decrees of the circuit courts and all other courts of this state, and judgments and decrees of the United States district courts held in this state, which may be presented for such record. The date, hour and minute of recording shall be noted at the bottom of such records.

Sections 55.08, 55.09 and 55.10, F. S., require certified copies of judgments and decrees of all courts to be recorded in the judgment lien book prior to becoming a lien on real property within the county of recordation.

Section 55.10, F. S., provides:

No judgment or decree hereafter rendered by the circuit courts or any other courts of this state shall be or become a lien on real estate until a certified transcript of said judgment or decree is recorded in the judgment lien record as provided by §28.21 (11) of these statutes. Upon being so recorded said judgment or decree shall become a lien on the real estate of the defendant only in the county where the same is recorded in the manner provided by said §28.21.

It is clear that prior to the enactment of Ch. 28033, 1953, no judgment or decree rendered by the circuit court or any other court in this state would become a lien on real estate until a certified transcript of said judgment or decree was recorded in the judgment lien record book as provided by §28.21(11), F. S. However, said Ch. 28033 establishes an alternative method for clerks of the circuit courts to use for recording instruments required by law to be recorded by them. The method provided by said Ch. 28033 does not appear to be mandatory. The act says that clerks of the circuit courts *may* record instruments which they are required by law to record in the "official records" system of recording. Furthermore, the act does not repeal §28.21(11), F. S., which requires the clerks of the circuit courts to maintain a judgment lien record. In view of the fact that §4 of said Ch. 28033 (§28.221(4), F. S.), specifically provides that certified transcripts of judgments and decrees recorded in "official records" shall become liens on real estate of the defendants in the county where the same are recorded in the same manner as if said certified transcripts had been recorded in the judgment lien record, it is my opinion that in order for said judgments and decrees to become liens on real estate it is not necessary that they be recorded in the judgment lien record, notwithstanding the provisions of §§55.08, 55.09 and 55.10, F. S.

There was some question as to the constitutionality of said Ch. 28033 when enacted due to a defect in the title (8 Univ. of Florida Law Review, 121). However, it is my opinion that the legislative enactment of the revised statutes in 1955 probably cured any defect in the title (see *State ex rel Badgett v. Lee*, 156 Fla. 291, 22 So. 2d 804 (1945); *McConville v. Ft. Pierce Bank & Trust Co.*, 101 Fla. 727, 135 So. 392 (1931); *Rodriguez v. Jones*, (Fla.) 64 So. 2d 278). Furthermore, the 1955 legislature, by Ch. 29995, 1955, declared that the "recording of all judgments heretofore made under §28.221, is hereby validated and confirmed and they are hereby declared to be liens on the real property of the defendants in the counties where the same are recorded in the same manner as if certified transcripts thereof had been recorded in the judgment lien record."

It is my opinion, in the light of the foregoing observations, that the question should be answered in the affirmative.

057-105—April 25, 1957

HIGHWAYS, BRIDGES AND FERRIES

JACKSONVILLE EXPRESSWAY AUTHORITY—AUTHORITY OF BOARD OF ADMINISTRATION TO INVEST CERTAIN FUNDS—\$349.05, F. S.

To: *Ralph A. Potts, Executive Director, State Board of Health, Tallahassee*

QUESTION:

Is the state board of administration authorized to deposit with the Chase Manhattan bank all debt service funds and proceeds of investments now held by it for the account of Florida state improvement commission Jacksonville expressway revenue bonds, dated Oct. 1, 1950 (sometimes referred to herein as 1950 bonds) for application as provided in the trust indenture and the escrow agreement, as hereinafter described?

There has been furnished to us copy of the trust indenture heretofore entered into between Jacksonville expressway authority, Guaranty Trust Co., trustee, and the Barnett national bank of Jacksonville, co-trustee. Also counsel for the authority has furnished us with copy of a proposed escrow deposit agreement for execution by the authority and the Chase Manhattan bank, paying agent. Accompanying the request for opinion is the board's standard form of remittance letter designed to cover deposit of funds with a designated paying bank.

On April 9, 1957, the authority awarded the sale of \$70,000,000 par value of its bonds for the purpose of obtaining funds to retire the 1950 bonds and to finance the construction program, as set forth in said trust indenture and the lease-purchase agreement executed by the authority and the state road department of Florida. In pursuance of the trust indenture, the authority has requested the board to transmit to the Chase Manhattan bank the funds described in the above question, to be used by said bank with necessary amount of funds to be deposited by the trustee for the account of the authority, derived from proceeds of sale of its bonds, for the retirement not later than Oct. 1, 1960, of the 1950 bonds.

In the resolution authorizing issuance of the 1950 bonds it was provided that pursuant to "Chapter 21853, Laws of Florida, Acts of 1943, and other applicable statutes," the board was appointed fiscal agent to "administer the Duval County gasoline tax funds as provided in Article II herein"; that after Florida state improvement commission had received proceeds of the bonds, paid its costs and transferred the remainder of such proceeds, as provided in such resolution, it was provided that, "the Board shall succeed, in accordance with said statutes, to all authority, powers, duties and discretions of the Commission with regard to these Bonds, including the power to issue refunding bonds for any of such Bonds or interest coupons thereon, and shall receive, manage and disburse all moneys and administer and maintain all funds provided for in this Article III. . . ." The resolution set forth provisions relating to redemption of such bonds; and the board was charged with duties with respect thereto. It is sufficient here to state that all bonds of said issue become optional for payment at par on Oct. 1, 1960. Said bonds are payable at "The Chase National Bank of the City of New York, New York."

On Nov. 1, 1956, we issued opinion 056-317 to the chairman of Jacksonville expressway authority to the effect that under the language of §349.05(3), F. S., if the board decided it could not function as fiscal agent, it should so notify the authority and give its consent that the authority "may negotiate and enter into a trust deed, bond indenture or other agreement with a bank or trust company. . . ." On Nov. 13, 1956, the board adopted resolution giving its consent "to the employment by the Jacksonville Expressway Authority of any banks or trust companies within or without the State of Florida as its bond trustee, registrar, paying agent and depository."

The trust indenture provides (pp. 37, 38) that before the authority's bonds shall be delivered by the trustee there shall be filed with the latter certain documents, among which is copy of resolution of the authority to the effect (1) providing for redemption on Oct. 1, 1960, of all outstanding 1950 bonds; (2) containing form of redemption notice to be published; and (3) irrevocably instructing the trustee in the name of the authority with respect to publications of such notice, as detailed. The trust indenture provides further (p. 39) that upon delivery of said bonds and receipt of purchase price, the proceeds of the bonds "shall be applied simultaneously with the delivery of said bonds," for detailed purposes, among which is the following: "(b) There shall be deposited with The Chase Manhattan Bank, New York, New York, Paying Agent for the Outstanding Bonds, for application as provided in Article VII, an amount certified by the Authority as equal to: (I) The principal amount of such outstanding bonds, less any amounts then held by such Paying Agent or by the State Board of Administration of Florida, as fiscal agent for the Commission, in the Bond Service Fund, Bond Reserve Fund and Bond Redemption Fund for such Outstanding Bonds, which funds shall have been, or simultaneously therewith shall be, remitted to said bank, plus (II) An amount equal to the interest which will accrue on such Outstanding Bonds to their maturity or to October 1, 1960, whichever date is earlier." Article

VII of the trust indenture (pp. 79 and 80) refers to moneys deposited with the Chase Manhattan bank, required for paying the principal and interest of the 1950 bonds, as above mentioned; requires that such moneys be deposited in a special account in said bank designated, "Florida State Improvement Commission Jacksonville Expressway Bond Redemption Fund," to be irrevocably held in trust, and invested in direct obligations of the U. S. maturing not later than Oct. 1, 1960, "under and pursuant to an escrow deposit agreement to be made and entered into by and between the Authority and The Chase Manhattan Bank for the sole and exclusive purpose of paying such principal and interest as will become due and payable ... beginning with April 1 or October 1 after delivery of the Series 1957 bonds and ending October 1, 1960, of all said Outstanding Bonds which mature after said date."

The bonds of the authority were validated by a decree of the circuit court of Duval county, which decree was affirmed by our supreme court in its opinion filed March 29, 1957, in the case of the State of Florida v. Jacksonville Expressway Authority, Case No. 28,301. A study of that opinion and an examination of the assignments of error and points urged in the brief of the appellant in that cause evidence that the plan for the retirement of the 1950 bonds was placed in issue in said cause by such assignments and points urged.

We have carefully examined the proposed form of escrow deposit agreement. The board is not required to be and is not made a party to the agreement. As evidenced by the foregoing recitals herein and the conclusions hereinafter reached, when the board has delivered to the Chase Manhattan bank the funds contemplated by the question it shall be relieved of substantial duties as fiscal agent for the 1950 bonds. However, at the time the board transmits such funds to the Chase Manhattan bank, it shall be satisfied that all acts and things required by the trust indenture relating to the retirement of the 1950 bonds prior to delivery of the authority's bonds, have been done and performed or will be done and performed. We find the proposed escrow deposit agreement to be appropriate.

In view of the foregoing, in my opinion the question is answered as follows:

The state board of administration of Florida is authorized and required to remit to the Chase Manhattan bank all amounts held by the board for the account of the 1950 bonds in the bond service fund, bond reserve fund and bond redemption fund, including proceeds of investments of any moneys in any of said funds, upon its being evidenced to said board that the escrow deposit agreement in the form delivered to the board has been or will be executed by the authority and the Chase Manhattan bank.

In transmitting such funds to the Chase Manhattan bank, your regular form of transmittal letter, prepared according to the attached copy, may be used.

It is to be noted that in the form of transmittal letter there is the requirement that upon payment of the described bonds the paid and cancelled bonds and coupons shall be sent to J. Edwin Larson, state treasurer, as treasurer, state board of administra-

tion and county treasurer, ex-officio. An examination of the trust indenture and other relevant documents fails to disclose any particular reference to these paid items; and reasonably such paid and cancelled items should be so delivered to said treasurer. This appears to be agreeable to Jacksonville expressway authority.

STATE OF FLORIDA
STATE TREASURER, AS TREASURER, STATE BOARD OF
ADMINISTRATION AND COUNTY TREASURER EX OFFICIO
TALLAHASSEE

The Chase Manhattan Bank
 Bond and Coupon Paying Division
 New York, N. Y.

VOUCHER No. _____

Gentlemen:

Subject to the conditions recited below, I enclose the following check or checks:

J. EDWIN LARSON, State Treasurer,
 as Treasurer, State Board of Administration
 and County Treasurer, Ex Officio

Drawer	Check No.	On Whom Drawn	Amount
Describe New York exchange check or checks.....			\$ 4,259,311.69
To be remitted you for account of Jacksonville Expressway Authority by Guaranty Trust Company, Trustee			\$23,857,780.81
Total			\$28,117,092.50

You are requested to use these funds in payment of the following bonds and/or coupons, and upon payment of same to send the paid cancelled bonds and/or coupons to *J. Edwin Larson, State Treasurer, as Treasurer, State Board of Administration and County Treasurer, Ex officio, Tallahassee, Fla.*, and it is understood that these funds are not for deposit in the ordinary sense and are not to be considered a part of the assets of the bank, but are trust funds to be used only for the specific purpose herein stated and shall be kept by the bank available at all times for the purpose herein described.

The said amount of \$28,117,092.50 shall be deposited by you in an account to be designated "Florida State Improvement Commission Jacksonville Expressway Bond Redemption Fund" and used as provided in Section 7.01 of that certain trust indenture dated as of January 1, 1957, entered into between Jacksonville Expressway Authority, Guaranty Trust Company of New York, as Trustee, and The Barnett National Bank of Jacksonville, as Co-Trustee, and pursuant to an escrow deposit agreement entered into by and between Jacksonville Expressway Authority and The Chase Manhattan Bank, for the sole and exclusive purpose of paying the described principal and interest and for the redemption on October 1, 1960, of all outstanding bonds maturing after said date, all as described in list attached hereto. Until such time as you have received from said Trustee the aforesaid sum of \$23,857,780.81 for deposit in said account, the funds transmitted herewith are subject to recall by the remitter, whenever by him deemed advisable.

Endorsement by the Receiving Bank:

The undersigned bank hereby acknowledges receipt of the remit-

tance above described and accepts the same on the terms and conditions hereinabove stated.

Please include in your endorsement the name of your bank, signature of a duly authorized officer of the bank, and show the title of such officer, as well as the date remittance is received and acknowledged.

DATE _____

Name of Bank _____

Signature _____

Title _____

057-107—April 25, 1957

TAXATION

MUNICIPALITIES—LEVY OF TAXES ON PUBLIC SERVICES —AMERICAN RED CROSS—§167.431, F. S.

To: T. T. Oughterson, Stuart

QUESTION:

May the utility taxes authorized by §167.431, F. S., be imposed against the utility bill of the American red cross?

Said §167.431, F. S., provides that any municipal ordinance imposing a utility tax under and pursuant to said section "may provide that federal, state, county, and municipal governments and their commissions and agencies and other tax supported bodies, public corporations, authorities, boards and commissions shall be exempt from the payment of the taxes imposed and levied thereby" The taxes imposed under said §167.431, being excise taxes and not ad valorem taxes, are not within the purview of the exemption provisions of §1, Art. IX, and §16, Art. XVI, State Const. (*Lakeland v. Amos*, 106 Fla. 873, 143 So. 744; *Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608; *Jacksonville Gas Co. v. Lee*, 110 Fla. 61, 148 So. 188).

The authority of §167.431 appears to be to levy a tax on the purchaser of utility service and not on the seller. The tax is therefore one against the American red cross. As a general rule a state may not impose a license or privilege tax on the activities of the federal government or on the business of its agencies or instrumentalities, except where the U. S. has consented thereto (53 C. J. S. 469-470). Generally a sales tax or privilege tax may not be levied on sales made to the U. S. or one of its agencies or instrumentalities unless authorized by congress (53 C. J. S. 471, §6). We also entertain serious doubt as to whether §167.431 is authority for a municipality to levy a utility tax against the state or its agencies, unless such authority be provided by other statutes. We doubt the right to exempt the state in an agreement on the part of the state, or consent on the part of the state, to pay an excise tax.

The state legislature is without authority to provide for the levying of a license or excise tax against an agency or an instrumentality of the U. S. Section 167.431 is no authority to levy a utility tax against the U. S. or one of its agencies or instrumentalities. This brings us to the question of the nature of the American red cross. The American red cross was incorporated by congress in 1900 to carry out certain treaty provisions

with other nations (see historical note appended to §1, title 36, U. S. code annotated), regarding the care of the wounded and sick of armies. The corporation was reorganized and reincorporated by congress in 1905, which act was amended in some particulars in 1947. It appears from said §1 of title 36 that the American red cross is a body corporate and politic *in the district of Columbia*, not of the district of Columbia. The incorporators were not from the district of Columbia alone, but were from many of the states. Reports are required to be made by the red cross to the department of defense, which reports must be audited by such department and transmitted to congress (§6, title 36, U. S. code). Many other statutory provisions indicate a connection between the American red cross and the U. S. We conclude, as did the supreme court of Oklahoma, Okla., 279 P. 2d 1096, that the American red cross is a national corporation having many of the features of an instrumentality of the U. S., created and established for the carrying out of treaty obligations with other countries.

Finding no federal statute or law authorizing the levy of the taxes in question against the American red cross, either by name or as a federal agency, the above question is answered in the negative.

057-108—April 28, 1957

PUBLIC OFFICES

CONSTITUTIONAL PROVISIONS RELATING TO PERSON HOLDING TWO OFFICES UNDER GOVERNMENT OF STATE—JUSTICE OF PEACE; CITY MAYOR— §15, ART. XVI

To: *F. W. Bedenbaugh, Justice of Peace, Lake City*

QUESTION:

Does the constitution of the state prohibit a person, while holding the office of justice of the peace, from also holding the office of mayor of a municipality in Florida?

Section 15 of Article XVI of the Constitution of the State of Florida, provides that "... no person shall hold, or perform the functions of, more than one office under the Government of this State at the same time ...". The Supreme Court of Florida, in the case of Attorney General v. Connors, 27 Fla. 329, 9 So. 7, held that the Sheriff of a County might hold the office of City Marshal. In the body of the opinion, the Court after referring to the above quoted provision of the State Constitution, said that the inhibition in the Constitution is aimed solely and entirely against offices held under or whose duties appertain to the government of the state, and that after careful and exhaustive search the court was unable to find any authority that holds that the government of municipalities forms any part of the government of the state as such, considered in the broad sense of the term "state government."

In the case of *In re Opinion of the Justices*, 121 Fla. 577, 163 So. 410, the Supreme Court of Florida, held that a "municipal officer" is neither a state officer nor county officer although he

may be either in addition to being a state officer, unless statutes which pertain to the municipal officer forbids.

It is my opinion that your question should be answered in the negative.

057-109—April 26, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—AVERAGE FINAL COMPENSATION AS USED
IN CH. 122, F. S.—§122.02, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a state or county officer or employee is paid a fixed sum for the first eight hours of services in each month, plus a fixed hourly wage for all services performed in such month in excess of eight hours, may the hourly wage be counted when determining the "average final compensation" of such officer or employee for the purposes of retirement?

"*'Average final compensation'* shall mean the *average salary* of the ten best contributing years of the last fifteen years prior to retirement, or the career average since July 1, 1945, whichever is the greater" "*'Salary'* shall mean the *fixed monthly compensation* paid officers and employees, and where officers' or employees' compensation is derived from fees set by statute, salary shall be the total cash remuneration received from such fees. Under no circumstances shall salary include fees paid professional persons for special or particular services." "*'State and county officers and employees'* shall include all full time officers and employees who receive compensation for services rendered from state or county funds . . . ; provided that such compensation in whatever form paid shall be specified in terms of *fixed monthly salaries* by the employing state or county agency or state or county official and shall not include amounts allowed for professional employees for *special or particular services*" (§122.02, F. S.). (Emphasis supplied.)

Under the above statutes the *average final compensation* of an officer or employee depends upon the *average salary* received during a stipulated 10 years; *salary* is defined as the *fixed monthly compensation of the officer or employee*; the term *fixed monthly salary* is also used in the definition of state and county officers and employees. If we accept the terms "fixed monthly compensation" or "fixed monthly salary" strictly and as requiring every employment contract to provide a fixed and definite monthly compensation without regard to the number of days employed, then the definitions would seem to exclude day laborers, who are defined in Webster's new international dictionary, 2nd ed., as "one who works by the day or for daily wages." A day laborer was defined in *Groves v. Kansas City, etc., Co.* 57 Mo. 304, as one who performs day labor or performs labor by the day (see also 25 C. J. S. 1008). In this connection it is noted that "day laborers" were excluded from the state and the county retirement systems under Chs. 22831 and 22938, 1945 and were not brought under the said systems until the adoption of Chs. 28174 and 28175, 1953. Chapter 122, F. S., was designed and intended as a consolidation and

revision of the said state and county retirement systems (§122.01, F. S.). We doubt that there was any intention on the part of the legislature in making the said consolidation and revision of the retirement systems to exclude day laborers. Rules and regulations adopted under the prior systems defined day laborers (excluded from the systems) as "unskilled manual laborers working by the day." This class of workers was brought in under the 1953 amendments.

We are, therefore, of the opinion that the definitions above quoted from §122.02, F. S., were intended to embrace the so-called day laborers. These observations suggest an ambiguity in the application of the said definitions. The terms "fixed monthly compensation," and "fixed monthly salary," doubtless refer to the same thing. The word "monthly" is a word of common use having a well defined and understood meaning (58 C. J. S. 1198). The word "fixed" has been defined as meaning established, firm, fastened, finally determined upon, immovable, securely placed, unalterable, lasting, liquidated or rendered certain (36 C. J. S. 886). To the same effect see also *Youngblood v. State*, 19 Ala. App. 561, 100 So. 87. In *Hedrick v. U. S.*, 16 Ct. Cl. 88, text 101, the court said that a salary was fixed when it is at a stipulated rate for a definite period of time. In *Sharpe v. Robertson, Va.*, 5 Grat. 518, the court said that the word "fixed," as used in a constitutional provision that judges shall receive a fixed salary, does not mean unchangeable, but means about the same thing as "at stated times." In *McKann v. Irvington*, 133 N. J. L. 63, 42 A. 2d 391, text 393, the court said that an established meaning of "fix" is to adjust or regulate. To "fix compensation" is to prescribe a rule by which it is to be determined (*Flagg v. Columbia County*, 51 Or. 172, 94 P. 184, text 186). In *Nippert v. Richmond*, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760, it was held that an ordinance levying a tax of \$50 plus $\frac{1}{2}$ of 1% of gross receipts in excess of \$1000 was a "fixed sum license tax" which burdened commerce.

In *Powers v. Isley*, 66 Ariz. 94, 183 P. 880, text 884, the court defined the word "fixed," when pertaining to salaries, after referring to Webster's dictionary, as meaning "securely placed or fastened, settled, established, firm, immovable, unalterable; hence, a 'fixed' salary is one that is entirely placed or fixed *with regard to its duration.*" In *Re. Starer*, 42 Fed. Supp. 773, an application for a loan contained the question "what is your fixed salary," to which the applicant answered \$5000 per year. Actually his salary was \$60 per week, plus overtime pay which brought the total compensation to about \$5000 for the previous year. The court remarked that "it would be too fine a point on the word 'fixed' to suggest that his answer to the question was untrue." In *Russell v. Buck*, 294 N. Y. 50, 60 N. E. 2d 537, text 538, a school building custodian had been paid a monthly salary for regular services (the school term) plus an hourly rate for services performed during vacation. It was held that the vacation compensation was nonetheless salary. This case involved a retirement question. In *Douglas v. Pension Board*, 75 Cal. App. 335, 242 P. 756, text 758, a municipal charter contained provisions for a retirement system for employees serving for a fixed number of years; an employee paid a daily wage was held to be

within the statute, his annual wage being held to be the total compensation paid him during each year. In *Kelly v. Loveland*, 141 Pa. Super. 455, 15 A. 2d 411, the court interpreted the term "salary" to include commissions; the officer or employee in question received an annual wage of \$120 plus commissions on the taxes collected which amounted to considerably more than the said annual wage. In this connection see also *State v. Abbott*, 43 Del. 472, 48 A. 2d 745; *Selectmen of Brookline v. Allen*, Mass., 90 N. E. 2d 903.

From the above and foregoing we feel that the formula set out in the above question, if the rate of pay is reasonable, furnishes a plan for a *fixed monthly compensation or salary* which may be used in *arriving at the average final compensation* of the officer or employee receiving the same, so that the above question is answered in the affirmative.

We conclude that in the case mentioned in the question the employing authority has prescribed the formula for fixing the monthly compensation or salary. It may vary depending upon the hours employed in discharging the routine work of the employment but the formula is fixed and applicable mathematically. This is not a situation where fees are paid for *special or particular* services. It is a regular retainer made dependent upon the actual hours engaged in performing the month by month routine duties as school board attorney. It has no reference to fees for handling special items such as bond validation or other litigation.

057-110—April 26, 1957

LEGISLATION

POPULATION ACTS—SPECIAL CENSUS—OKALOOSA COUNTY—CONSTRUCTION OF §3, CH. 31055, 1955— CHS. 28778, 1953 AND 30353, 1955

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Do the provisions of §3, Ch. 31055, 1955, make the 1956 special census of Okaloosa county, applicable to all population acts embracing the said 1956 population?

2. If the above question is answered in the affirmative, is the compensation of the county judge controlled by Ch. 28778 or Ch. 30353, 1953 and 1955?

3. If the first above question is answered in the affirmative, what is the effective date in Okaloosa county of the statutes and laws which apply according to the said 1956 census?

The legislature, by said Ch. 31055, 1955, provided for the taking of a special census for Okaloosa county, which we are advised was taken by the federal bureau of the census for Okaloosa county as of Sept. 21, 1956; the results of the said census having been reported to the board of county commissioners of said county on Nov. 8, 1956. The population as of said Sept. 21, 1956, as reported to the county commissioners, was 53014, as against the 1950 regular census count of 27533. Chapter 31055, being a local or special act, within the purview of §21, Art. III, State Const., we presume, for the purposes of this opinion that

the requirements of said constitutional provision were fully complied with.

Section 3 of said Ch. 31055, provides that "when said census has been taken and the results officially announced by the federal agency taking said census, then said census shall be and become the *latest official census of such county* for all purposes whatsoever, unless otherwise expressly provided by law." The title to the said act contains the phrase "providing such census shall be the *latest official census*." (Emphasis supplied.) Some statutes classifying counties according to population on a state-wide basis, such as the statutes relating to beverages and beverage licenses (see §561.34, F. S., for an example) are designed for uniform operation throughout the state, or throughout a reasonable classification of counties in the state, and were intended to refer to the regular state-wide decennial censuses, and not to special censuses. If special censuses were to be recognized in the application of laws and statutes of general operation throughout the state, such as the above mentioned beverage statutes, there would result an operation of the statutes that would not be uniform throughout the state.

In the light of these observations the 1st question must be answered by a qualified affirmative answer. It is answered in the affirmative as to all statutes and laws based on population *which were not designed* for state-wide operation or operation in a reasonable classification of counties; but as to statutes and laws designed for uniform operation throughout the state, or for uniform operation throughout a reasonable classification of counties, the question is answered in the negative. There may be some difficulty in classifying some population acts under this rule.

Chapters 28778 and 30353, 1953 and 1955, do not appear to be laws for uniform state-wide or similar operation, and appear to be such as may come within the purview of Ch. 31055, and the census taken pursuant thereto. It is noted that Ch. 30353 purports to fix the compensation of the county judge, as well as certain other mentioned county officers, and contains the following, "shall receive as yearly compensation for official services from the whole (or) part of the fees or commissions so collected and earned the following sum *only*; all net income from such office not to exceed \$9,000.00 per annum." This enactment shows a clear intention on the part of the legislature to limit the total compensation of the officers therein named to \$9000 *only*. This would seem to include the compensation allowed the county judge when acting as juvenile judge, which may be fixed by Ch. 28778, 1953. These observations seem to answer the 2nd question.

Section 3 of Ch. 31055, provides as set out in the first part of this opinion, from which it seems that when the results of the census have been "officially announced by the federal agency taking the census" it becomes effective as the "latest official census of" the county. It was officially announced when the results of the census were officially reported to the board of county commissioners by the federal census bureau. This seems to answer the 3rd question.

057-111—April 26, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COMPENSATION OF COUNTY ATTORNEY FOR COLUMBIA
COUNTY—CHS. 15932, 1933; 27476, 27026, 1951**

To: State Auditing Department, Tallahassee

QUESTIONS:

1. Under the provisions of Ch. 27476, 1951, may the county attorney for Columbia county, receive compensation, in addition to the \$1200 mentioned in §4 of said act, for obtaining road rights-of-way, prosecuting eminent domain proceedings, preparing legal notices, etc., and for other special legal services rendered?

2. If the answer to the 1st question is in the affirmative, does such extra compensation constitute compensation for official services, to be accounted for under the provisions of Ch. 27026, 1951?

The county attorney for Columbia county, has been an elective office since the adoption of Ch. 15932, 1933; however, said Ch. 15932, appears to have been revised and reenacted by Ch. 27476, 1951. The powers and duties of the said county attorney, as set out in §3 of the 1933 enactment are substantially identical with the powers and duties set out in §2 of the said 1951 enactment, which is in words as follows:

The duties of said officer shall be to prosecute all persons, firms and corporations charged with the commission of any kind of offense against the laws of the State of Florida, in or before the County Judge's Court, and all cases wherein the said county judge shall act as a committing magistrate for circuit court. He shall attend the regular and special meetings of the Board of County Commissioners, and Board of Public Instruction, and represent them, or either of them, in all litigation concerning or in which Columbia County, Florida, is interested, and shall prosecute and defend all civil actions brought by or against either of said Board of County Commissioners or Board of Public Instruction, or any member of either of said boards, touching or in anywise appertaining to his official duties; he shall prepare all deeds, contracts, agreements and such other written instruments as shall be necessary from time to time to transact the business of Columbia County, Florida; he shall give written opinion, upon request of any lawful board or commission, now or hereafter created, touching the legality of such matters and things as concern said board or commission, including the Board of County Commissioners, or Board of Public Instruction of Columbia County, Florida; he shall represent the interests of Columbia County, Florida, in all matters touching the validating of bonds, the collection of interest or principal on bonds, and all litigation touching any bonds which have been heretofore or may hereafter be owned, issued, or acquired by Columbia County, Florida; he shall collect delinquent taxes, where so instructed to do (1933 act inserts here the phrase "without additional charge,

or charges") and shall represent Columbia County, Florida, in all suits brought to set aside, or declare illegal, any levy for the collection of taxes, now or hereafter made, or any injunction brought to restrain the collection of the same.

The only difference between the two sections is that the phrase "without additional charge, or charges" appears in the 1933 act, as above indicated. The powers and duties under the two acts are substantially identical.

The compensation or salary of the said county attorney, under the 1951 act, is provided by §4 which is in words as follows:

The salary of the County Attorney of Columbia County, Florida, shall be twelve hundred dollars per annum payable in twelve monthly installments and shall be paid fifty dollars by the Board of County Commissioners out of the fine and forfeiture fund, and fifty dollars by the Board of Public Instruction out of current expenses other than instructional salaries and transportation fund, and in addition thereto said County Attorney shall be entitled to and shall receive five dollars for each conviction and also receive five dollars for each cash bond forfeited or estreated in his court. The Board of County Commissioners, or Board of Public Instruction, or other county officials of Columbia County, Florida, shall not have power or authority to employ special or additional attorney or attorneys to represent the interests of the County of Columbia, or any officer thereof, and to pay for said special or additional legal services out of the moneys belonging to the County of Columbia, and to employ said additional or special counsel, other than provided for in this Act by any board or officer of the said Columbia County, shall be cause for removal or suspension from office, and the circuit court is hereby granted equity jurisdiction to restrain the payment thereof upon application of any taxpayer of the County of Columbia and State of Florida. (Emphasis supplied.)

This differed in the salary to be paid under the said 1933 act, §5 of which was in words as follows:

The salary of the County Attorney of Columbia County, Florida, shall be, as now, or hereafter provided by law, and shall be paid by the Board of County Commissioners upon requisition from and out of the fine and forfeiture fund. The Board of County Commissioners, or Board of Public Instruction, or other county officials of Columbia County, Florida, shall not have power or authority to employ special or additional attorney or attorneys to represent the interests of the County of Columbia, or any officer thereof, and to pay for said special or additional legal services out of the moneys belonging to the County of Columbia, and to employ said additional or special counsel, other than provided for in this Act by any board or officer of the said Columbia County, shall be cause for removal or suspension from office, and the circuit court is hereby granted equity jurisdiction to restrain the payment thereof upon ap-

plication of any taxpayer of the County of Columbia and State of Florida.

The answer to the 1st question requires the construction of §§2 and 4 of said Ch. 27476. We are confident that §4 of the enactment was designed to compensate the county attorney for the services required of him under §2 of the act. By the same rule any services performed by the county attorney not within the purview of §2 of the statute would not be compensated by the sums mentioned in §4. It is noted that the latter part of §2 of the said act is substantially identical with §3 of Ch. 15932, the only difference being the deletion of the phrase "without additional charge or charges" by the 1951 enactment. Although we may say that the phrase was deleted because made unnecessary by §4, it might be said on the other hand that the deletion indicated that additional compensation might be intended for the collection of delinquent taxes. This may raise an ambiguity requiring a construction of the statute. There is attached to the request for opinion certain audit statements showing that just prior to the enactment of Ch. 27476, and while Ch. 15932 was in force, additional compensation was paid the county attorney, during 1949, 1950 and until the enactment of Ch. 27476, certain sums for "right-of-way work," "validation proceedings," "legal notices," "legal services," services in preparing certain instruments, "defending mandamus," "legal services" in connection with certain cases thought to be eminent domain proceedings, and other things. These items amounted to several hundred dollars per year. Similar audit statements show the payment of extra compensation subsequent to the enactment of Ch. 27476, for like or similar services. These payments suggest a departmental construction of both Ch. 15932, 1931, and Ch. 27476, 1951, by the board of county commissioners and the board of public instruction of the county.

"Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation" (*Gay v. Canada Dry Bottling Co., Fla.*, 59 So. 2d 788, text 790) "should not be disregarded or overturned . . . except for most cogent reasons, unless *clearly erroneous*" (*King v. Seamon, Fla.*, 59 So. 2d 859, text 861). In this connection see also *McKinney v. State, Fla.*, 83 So. 2d 875, text 876; *L. B. Price Mercantile Co. v. Gay, Fla.*, 44 So. 2d 87, text 88; *City of St. Petersburg v. Carter, Fla.*, 39 So. 2d 804, text 806. Omitting the effect of any construction placed upon §§2 and 4 of Ch. 27476, we would feel constrained to hold that compensation for defending "all civil actions brought by or against either said Board of County Commissioners or Board of Public Instruction, or any member of either of said boards, touching or in anywise appertaining to his official duties," and "all matters touching the validating of bonds," as well as other things expressly mentioned in §2 of the said statute, are compensated for by the sums fixed by §4 of the statute. Any attempt on the part of the board of county commissioners or board of public instruction to pay extra for services expressly included in §2 and by the statute required to be performed by the county attorney would, in our opinion, be *clearly*

erroneous. There would be no room in this connection for any construction of the statute by the said boards. County services not expressly mentioned in §2 of the statute, although included by implication, might be subject to construction, so that any such construction by county officers might be within the above rule of department or contemporaneous constructions. The construction placed on the statute by the county boards would seem to indicate a strict construction for §4 and a limitation of the general compensation therein provided to those services specifically mentioned and required and not to those services not specifically mentioned.

Although the general compensation mentioned in §4 of the statute seems to compensate for "all matters touching the validating of bonds," a strict construction would seem to exclude the proceedings prior to the preparation of the pleadings for the validation of the bonds. Suits for the condemnation of rights-of-way for public roads would seem to be included in the general compensation, however, a strict construction might not include examinations of title prior to the beginning of the proceeding and maybe attempts to procure a right of way without the use of eminent domain. The preparation of legal notices for bids on contracts, for bids on materials, etc., may not be within the general compensation when the statute is strictly construed.

The above statutes, authorities and observations seem to indicate a conditional affirmative answer to the 1st question, limited however by the above and foregoing. We feel that the conclusions reached will form a predicate from which the specific questions of compensation arising from each item may be answered. The matter is one that probably should be clarified by a bill for declaratory decree.

We feel that in so far as the 1st question is answered in the affirmative, or stated otherwise, in so far as extra compensation is payable such compensation is within Ch. 27026, 1951, and should be taken into consideration when calculating the net income of the office.

057-112—April 29, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEMS—CONSTRUCTION OF §122.08(4),
F. S., RELATING TO ELECTION OF BENEFITS AND
RIGHTS OF WIFE—§§112.05, 122.01, 122.08(4) AND
CHS. 122, 112 AND FORMER CHS. 121 AND
134, F. S.**

To: Ray E. Green, Comptroller, Tallahassee

QUESTIONS:

1. A person eligible to receive benefits under Ch. 122 has not withdrawn his contributions from the state officers and employees retirement fund and has on file an election under the provisions of §122.08(4). He has retired under the provisions of §112.05 and does not transfer his retirement from §112.05 to Ch. 122 before he dies, may his widow after his death receive the benefits provided in said subsection (4)?

2. A person is not now a state or county employee

nor was he at the time Ch. 122 was enacted in 1955. He has more than 10 years service and is eligible to receive benefits. He has not applied for benefits and does not plan to do so right away. May he exercise the election of benefits set forth in §122.08(4) and should he die before applying for benefits would his wife be eligible to receive the reduced benefits set forth in said subsection (4)?

Subsection (4) of §122.08, F. S., above referred to, provides that:

Any state or county officer or employee shall have the right at any time prior to receipt of his or her first monthly installments of retirement compensation to elect to receive a reduced retirement compensation with the provision that the surviving spouse shall continue to draw such reduced retirement compensation (or one-half thereof if so designated) so long as he or she shall live. The amount of such reduced retirement compensation shall be the actuarial equivalent of the amount of such retirement compensation otherwise payable such officer or employee. Any state or county officer or employee who becomes eligible for retirement may select one of the options provided in this subsection and continue to hold office or be employed. Should such officer or employee die before retiring, his surviving spouse shall be entitled to receive either the accumulated contributions of such officer or employee at the date of death or the reduced retirement compensation to which the surviving spouse would have been entitled to under such option, calculated on the assumption that such officer or employee retired on his date of death. Any officer or employee shall have the right at any time prior to actually retiring to change the option selected. The selection of an option under this subsection will not become effective until six months after date of selection; provided . . . that should the option be changed at the time of retirement, such option shall be effective immediately upon retirement.

For the purposes of the 1st question, we shall presume that the person retiring under §112.05, F. S., was also qualified to have retired under the state and county officers and employees retirement system (Ch. 122, F. S.) or under one of the former retirement systems (Chs. 121 and 134, F. S.), but elected to retire under said §112.05 instead, which section was not repealed by either of Chs. 121, 122 or 134, F. S.; however, said §112.05, since the adoption of Ch. 28148, 1953, is not applicable to new state or county officers or employees. It was held by this office on May 14, 1956 (056-146) that a state officer or employee, although a contributing member of the state and county officers and employees retirement system, may, leaving his contributions under Ch. 122, F. S., (including contributions made under Chs. 121 and 134, or either of them), retire under said §112.05, and subsequently transfer such retirement to Ch. 122, F. S. But having once transferred to Ch. 122 he may not retransfer to §112.05. In the light of said opinion of May 14, 1956, we feel that a

person retired under §112.05, but eligible to transfer to Ch. 122, is in fact one eligible to retire under Ch. 122, and may make the selection provided in said §122.08(4), to be effective upon his election to transfer to Ch. 122; and, "should such officer or employee die before retiring, his surviving spouse shall be entitled" to make the same selection as is provided for the surviving spouse under said §122.08(4). These observations seem to answer the 1st question in the affirmative.

For the purposes of the 2nd question we have a former state or county officer or employee, who has not been a state or county officer or employee since the effective date of Ch. 122, F. S., but was a member of either the county (Ch. 134) or the state (Ch. 121) retirement system, with retirement time and credits for 10 or more years, and of sufficient age for immediate retirement, but who does not at this time plan immediate retirement. Chapter 122, F. S., clearly contemplates that a former state or county officer or employee who was a contributing officer or employee to the retirement system under Ch. 122, F. S., or to the retirement systems under former Chs. 121 or 134, F. S., is eligible for retirement upon reaching the retirement age. Section 122.08, F. S., makes provision for two retirement classifications; one at the age of 55 and the other at the age of 60. The provisions of §122.08(3) and (4), F. S., seems to be applicable to both classes for retirement. Chapter 122, F. S., is a consolidation and revision of former Chs. 121 and 134, F. S. In the absence of an election by a state or county officer or employee to retire under some provision of the prior statutes not brought forward into Ch. 122, it should be presumed that his retirement is intended to be under said Ch. 122. If a person elects to retire under the provisions of §122.08, it seems that he may have the elections therein provided, including subsection (4) thereof. However, where a person elects to retire under a provision in either of Chs. 121 or 134, F. S., not brought forward into Ch. 122, by reason of the rights reserved to him under §122.01 (3), then he would *not* seem to have the elections provided under §122.08(4), unless there was a similar election applicable to him under the former statute. In the application of §122.08(4), we see no reasonable reason for making a distinction between persons eligible for retirement merely and only because they be or not be presently employed by the state or a county, so long as no inequality arises. To make such a distinction might raise a question of equal protection of the laws.

We feel that the 2nd above question should be answered in the affirmative, both as to the election of benefits and the rights of the wife.

057-113—April 30, 1957

ELECTORS AND ELECTIONS

BOND ELECTIONS—LIST OF FREEHOLDERS, PURGING—§6,
ART. IX, STATE CONST.—§§97.091, 100.241, 100.281
AND 100.291, F. S.

To: Board of County Commissioners, Gainesville

QUESTION:

May the board of county commissioners, acting alone

or in conjunction with the supervisor of registration, at a time subsequent to the holding of a bond election, under and pursuant to §6, Art. IX, State Const., examine the freeholder registration list and delete therefrom the names of any duly registered electors who were not, on the day of the election, freeholders within the area of the election?

When §§100.281 and 100.291, F. S., are construed together and in the light of the opinion in *Bowers v. Alachua County*, 150 Fla. 581, 8 So. 2d 395, an affirmative answer to the above question is suggested; however, the court in the said *Bowers* case did not have before it the question posed and decided in *Holmer v. State*, 158 Fla. 397, 28 So. 2d 586, wherein it was held that under §6, Art. IX, State Const., the question of whether an elector was a freeholder or not was to be determined from the elector's status in that connection on the day of the election and not on the day of the closing of the registration books for the said election. Under §100.241, F. S., the boards of county commissioners may use the registration list, of electors who are freeholders, as the same appears from the records of the supervisor of registration, as showing *prima facie* who were qualified electors and freeholders at the time of the closing of the books, to which is to be added those proving their freeholder status on the day of the election.

The registration list of freeholders is *prima facie* correct until challenged in a lawful manner, however, under §§100.281 and 100.291, in the light of the *Bowers* case, this *prima facie* correctness may be challenged by the board of county commissioners, who may upon investigation and proper evidence make a separate determination of the question. However, a reading of the constitutional provision, in the light of the *Holmer* case, convinces us that the question when challenged must be determined as of the day of the election. This point was not before the court in the *Bowers* case and was therefore not there decided. This leads to only one conclusion, that is, if those qualified electors who were not freeholders on the election day, although registered as such, are to be deleted it seems to follow that those electors who were not registered as freeholders, but who were in fact freeholders on election day, must be added to the list of freeholders.

Although §97.091, F. S., requires that elector be registered in the precinct wherein he has his permanent home, a registration in violation of said section should not be cancelled, in the absence of fraud of the elector in securing the registration, but duplicate registration certificates should be issued in accordance with said section. We doubt that the said statute contemplates a cancellation and reregistration merely by the issuance of a duplicate registration certificate. Further, where the supervisor of registration erred and registered the elector in the wrong precinct, without any fault of the elector, it is a continuing duty of the supervisor of registration to correct the error. Such an error would not justify cancellation but should be corrected by the supervisor.

Although the above question is answered in the affirmative, any attempt to correct the registration list and delete names therefrom must be carried out under the rules above mentioned.

057-114—May 1, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—CONSTRUCTION OF §517.091, F. S.,
OVER-THE-COUNTER SALES IN FLORIDA—
§§517.05-517.091, F. S.**

To: *Florida Securities Commission, Tallahassee*

QUESTION:

Where a security has been outstanding and in the hands of the public for less than one year, as the result of a prior original marketing by the issuer, or by an underwriter on behalf of the issuer, may such security be traded in in this state prior to the time it qualifies for registration by announcement under §517.091, F. S.?

Section 517.07, F. S., prohibits the sale of securities, except sales under the exemptions mentioned in §§517.05 and 517.06, F. S., "unless such securities shall have been registered" as provided in Ch. 517, F. S. There are three classes of security registrations provided for by the Florida Statutes: (1) Registration by notification (§517.08, F. S.), (2) Registration by qualification (§517.09, F. S.) and (3) Registration by announcement (§517.091, F. S.). The first two classes of registration were included in Ch. 14899, 1931, but the third class was brought into the statutory laws of the state by Ch. 24066, 1947. Registration by notification (§517.08) and registration by qualification (§517.09) do not seem to be confined to registrations for sale by the issuer or by an underwriter on behalf of an issuer, but registrations may be made thereunder for sales of securities outstanding in the hands of the public.

Under §517.091, F. S., "securities that have been outstanding and in the hands of the public *for not less than one year* as the result of a prior original marketing by the issuer, or by an underwriter on behalf of an issuer, shall be entitled to registration by announcement," under the limitations imposed by said section. (Emphasis supplied.) Under §517.09, F. S., all securities required by Ch. 517, F. S., "to be registered before being sold in this state, and not entitled to registration by notification or by announcement, shall be registered only by qualification in the manner provided by" said §517.09. Construing §§517.08, 517.09 and 517.091, F. S., together, in the light of §517.07 which requires registration before sale in this state, except where exempted by §517.05 or §517.06, F. S., we must arrive at the conclusion that "securities that have been outstanding and in the hands of the public" *for less than one year*, so that they do not qualify under §517.091, F. S., must, prior to sale in Florida, be registered under either §517.08 or §517.09, as applicable.

We have obtained certain files and documents relative to the preparation and introduction, into the 1947 legislature, of what is now §517.091, F. S. Said section was evidently designed as a registration for secondary sales and not primary sales. Until such securities have been "outstanding and in the hands of the public for not less than one year" they may not be registered under this section. Registrations by announcement must be "only by a dealer registered in the office of the commission as provided by §517.12," F. S. Although §517.091 seems to be designed

for registration for across-the-counter or secondary sales only, registration under either §517.08 or §517.09, seems to qualify the securities so registered for either primary or secondary sales. Securities registered in this state under either §517.08 or §517.09, F. S., may, when they "have been outstanding and in the hands of the public for not less than one year, as the result of a prior original marketing . . ." be reregistered under §517.091.

The primary purpose of §517.091 appears to provide for the registration of "securities that have been outstanding and in the hands of the public for not less than one year as the result of a prior original marketing . . ." in another state, instead of registering the same under either §517.08 or §517.09, as was required prior to the adoption of said §517.091. This statute seems to contemplate registration in another state or in this state for the sale by or for the issuer, which resulted in the original marketing.

Where a security has been outstanding and in the hands of the public for less than one year, as the result of a prior original marketing by the issuer, or by an underwriter on behalf of the issuer, such security may be traded in in this state prior to the time it qualifies for registration by announcement, under §517.091, F. S., only when it has been registered in this state pursuant to either §517.08 or §517.09, F. S. After it has been outstanding as aforesaid for more than a year sales may be made pursuant to a registration under §517.091. Secondary sales of securities sold in this state, by or for the issuer under registration by notification or by qualification, may be made pursuant to the original registration, so long as such sales do not exceed the maximum sales price mentioned in such registrations. Before secondary sales of such securities may be made in this state in excess of such maximum sales price, reregistration at a new maximum price must be made or the original registration amended, unless registration may be and is made by announcement. These observations seem to answer the above stated question.

057-115—May 1, 1957

TAXATION

TANGIBLE PERSONAL PROPERTY TAXES ON TRAILERS;
ASSESSMENT, COLLECTION, ETC.—§§193.45, 200.28,
200.45 AND .320.07, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What procedure should be followed in assessing and collecting ad valorem taxes against motor vehicle trailers pursuant to §200.45, F. S.?

Section 200.45, F. S., provides in part that "there is hereby levied and assessed upon each automobile trailer, that does not have a current year's Florida license tag thereupon, the same amount that is assessed upon other personal property within the county where such trailer is found to be." This statute directs the county taxing officials to assess and collect ad valorem taxes, at the usual rate for tangible personal property, against all motor vehicle trailers in their county which are not equipped with current motor vehicle license tags by the termination of

the time allowed by §320.07, F. S., to wit, Feb. 20 of a current tax year, or such other time fixed by the governor under said section, if any. As soon as the time allowed for the purchase of current motor vehicle license tags has passed, it becomes the duty of the county taxing authorities to ascertain what motor vehicle trailers are without current motor vehicle license tags, and whenever such a trailer is found in the county it becomes the duty of the county tax assessor to fix its value for tax purposes and immediately issue his certificate to the county tax collector describing such trailer and fixing its full cash value for purposes of ad valorem taxes.

The taxes upon the said trailer become immediately due and payable "and the tax collector of such county shall collect the same within 15 days from the date of such certificate" unless the owner of the said trailer shall purchase a "Florida license tag for such trailer at any time prior to the aforesaid levy and sale, and the same shall operate to satisfy such ad valorem tax assessment and for levy upon such owner paying any fees allowed by law which have accrued to such tax assessor and tax collector prior to notification to them of the purchase of such Florida license tag." (Emphasis supplied.) The tax rate of the assessment is to be determined by said §200.45(3). The taxes under these assessments seem to be payable as soon as the tax assessor's certificate is delivered to the tax collector and is delinquent 15 days thereafter.

Section 200.45 does not seem to contemplate the publication of a tax delinquent notice as is required by §200.27, for other delinquent tangible personal property taxes; however, although not expressly required, we deem that it would be proper for the tax collector, upon determining the amount of the taxes to be assessed, to send a notice to the taxpayer similar to that provided in §193.45, F. S., showing the amount required to pay the said taxes. This notice might also state that should the taxpayer elect to purchase a license tag under and pursuant to said §200.45, such purchase will only satisfy the principal of the taxes assessed but not the costs and fees of the tax assessor and tax collector accrued by reason of the ad valorem assessment against the trailer, which must be paid notwithstanding the purchase of the license tag.

If levy is made for either the delinquent taxes, or for the costs and fees where a license tag has been purchased, then the sale should be made in accordance with §200.28, F. S. After a trailer has been seized for either the ad valorem taxes, or for costs and expenses accrued prior to the time the tax collector is notified of the purchase of a current Florida license tag, it should not be released until payment is made in full, or a proper license tag is purchased, and all costs and expenses of the tax assessor and collector have been paid.

The above observations seem to answer the above question.

057-116—May 8, 1957

TAXATION

INTANGIBLE PERSONAL PROPERTY—TAXABILITY OF SECURITIES ISSUED BY MUNICIPAL AND OTHER HOUSING AUTHORITIES IN OTHER STATES—

§§199.01, 199.02, 423.02 AND 423.03, F. S.;

§1, ART. IX, AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are bonds and other securities issued by public housing authorities of other states subject to taxation under Ch. 199, F. S.?

"This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the Legislature in the manner provided in section 1, article IX, of the Constitution," (Bancroft Investment Corp. v. City of Jacksonville, 157 Fla. 546, 27 So. 2d 162, text 170) or by the laws of the U. S. See also §16, Art. XVI, State Const., which requires that "the property of all corporations . . . shall be subject to taxation, unless" exempted by law. Such bonds and other securities are intangible personal property (§199.01, F. S.) and subject to taxation under Ch. 199, F. S., unless exempted by state or federal law.

Under §199.02(5), F. S., "intangible personal property belonging to the state, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." Under §423.03, F. S., "the debentures of a housing authority, together with interest thereon and income therefrom, shall be exempt from all taxes." We find nothing in this statute, nor the act from which it was derived, showing whether it is limited to housing authorities of this state or whether housing authorities of other states may be included therein. Section 423.02, F. S., which seems to exempt the properties of housing authorities, seems to relate to housing authorities of this state.

Statutes of one state have no extraterritorial effect in another state (Hartford Accident & Indemnity Co. v. Thomasville, 100 Fla. 748, 130 So. 7) although rights arising under them may in some cases be enforced by the courts of another state. We are of the opinion that §423.03, F. S., was not intended to exempt from taxation securities issued by housing authorities of other states in the hands of residents of this state. We find no statute or law of this state exempting from taxation securities issued by housing authorities of other states. Although §§1405 and 1452, title 42, of the U. S. code, seem to exempt such securities from federal taxation, we find nothing in the federal statutes which may be construed as providing for the exemption of such securities from state taxation.

The above question should be answered in the affirmative, unless the holder of particular securities shall be able to call to the tax assessor's attention some statute expressly granting exemption in this state to such securities.

057-117—May 8, 1957

TAXATION

EXEMPTIONS FROM TAXATION UNDER §1, ART. IX, AND §16, ART. XVI, STATE CONST.—§192.06, F. S.

To: *City of Orlando*

QUESTION:

Is real property owned by a charitable trust, although not presently used for charitable or public purposes, entitled to tax exemption?

Section 1, Art. IX, State Const., requires the legislature to "prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." Section 16, Art. XVI, State Const., seems to provide that "the property of all corporations . . . (with certain exceptions not here material) . . . , whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property *be held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes." (Emphasis supplied.) In this connection see also §192.06 (3), F. S.

Under these constitutional and statutory provisions *ownership and utilization* of the property are the criterion for determining its exemption from taxation. Ownership alone is not sufficient, there must also be utilization for one or more of the purposes mentioned in the state constitution. (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummas v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78). This being true the question becomes primarily one of fact to be determined by the tax assessor. Both ownership and utilization (held and used exclusively) is required and if either is missing there can be no tax exemption.

These observations seem to answer the above stated question in the negative. The question shows no immediate utilization for charitable or public purposes, although the property may be used for such purposes sometime in the future.

057-118—May 8, 1957

TAXATION

COLLECTION OF TANGIBLE AND INTANGIBLE PERSONAL PROPERTY TAXES; GARNISHMENT—§§199.18-199.21 AND 200.27, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May tax executions, issued pursuant to §199.18, F. S., and tax warrants, issued pursuant to §200.27, F. S., be levied upon bank accounts of the taxpayer for the collection of delinquent intangible or tangible personal property taxes?

Section 199.21, F. S., provides that tax executions issued under and pursuant to §§199.19 and 199.20, "shall have the same

force and effect as a writ of garnishment when levied upon any person, firm or corporation who shall have any goods, moneys, chattels or effects of the delinquent taxpayer in his hands, possession or control or who shall be indebted to such delinquent taxpayer. When any tax execution is so levied upon any debtor or person holding property of the taxpayer, such debtor or person shall pay the debt or deliver the property of the tax delinquent to the tax collector or his deputy levying such writ, and the receipt of the tax collector or his deputy therefor shall be complete discharge to that extent of the debtor or person holding such property. In the event of such levy the tax collector or his deputy shall make note thereof upon the tax execution." And §200.31, F. S., provides that tax warrants issued under and pursuant to §200.27, "shall have the same force and effect as a writ of garnishment when levied by the tax collector or his deputy upon any person, firm or corporation who shall have any goods, moneys, chattels, or effects of the delinquent taxpayer in his hands, possession or control or who shall be indebted to such delinquent taxpayer. When any tax warrant is so levied upon any debtor or person holding property of the taxpayer, such debtor or person shall pay the debt or deliver the property of the tax delinquent to the tax collector or deputy tax collector levying such writ, and the receipt of the tax collector or his deputy therefor shall be complete discharge to that extent of the debtor or person holding such property. In the event of such levy the tax collector or his deputy shall make note thereof upon the tax warrant."

Unless trust funds are involved, general depositors, making deposits in banks, part with title to the funds deposited and become common creditors of the bank wherein the deposit is made (*Glidden v. Gutelius*, 96 Fla. 834, 119 So. 140, 120 So. 1; *Tomascello v. Murphy*, 100 Fla. 132, 129 So. 328), so that bank deposits are subject to garnishment (4 Am. Jur. 718, §254; 7 C. J. 671, §379; 28 C. J. 116, §162; 38 C. J. S. 282, §80; 33 C. J. S. 157, §24).

The above question is, therefore, answered in the affirmative.

057-119—May 8, 1957

TAXATION

APPLICATIONS FOR TAX DEED SALES—ORDERS RELATING
TO INCOMPETENT PERSONS—PROCEDURE—
§§47.25; 194.16, 194.18 AND CHS. 744-746, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where an application is made for a tax deed sale, based upon a tax sale certificate and tax lien encumbering lands of an insane person, how should the clerk of the circuit court proceed?

Under the statutes and laws of this state ad valorem taxes upon real property are assessed against the land itself and not against the owner of the land, and no tax execution or similar proceeding may be had to enforce payment from the landowner's property other than the lands assessed (see *Florida Industrial Co. v. State*, 114 Fla. 1, 152 So. 717). This being true tax deed sales

are quasi proceedings in rem if not proceedings in rem. The notice of application for tax deed (§194.16, F. S.) is jurisdictional (*Wells v. Thomas, Fla.*, 78 So. 2d 378, 89 So. 2d 259) and the failure to give the former owner notice of the application and tax deed sale, because of a defective notice, renders the tax deed defective (*Wells v. Thomas, Fla.*, 78 So. 2d 378, text 382). In *Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333, a tax deed notice published for less than the required 28 days was held to be invalid. This notice is the process of law pursuant to which the landowner is to be divested of title to his land. Unless this notice is properly and lawfully given there will be no due process of law.

If the holder of the tax sale certificate should apply to a court of equity for a foreclosure of his tax lien, service of the summons upon the insane person would not of itself be sufficient to confer jurisdiction over such insane person (see §47.25, F. S.) but service would also have to be made upon the guardian of such person or the person having custody of him. Under §194.18, F. S., a copy of the tax deed sale notice required by §194.16 is required to be mailed to the owner of the lands encumbered by the tax lien. Where the owner of the property encumbered by the tax lien and the tax sale certificate is insane we doubt that notice to the said owner would be sufficient to authorize the holding of the tax deed sale and the issuance of a tax deed. There would probably be a want of due process of law. Where the owner is insane we feel that copies of the notice should be served upon both the insane person and his guardian. Where there is no guardian for the insane person, one must be appointed and qualified before a valid tax deed may be issued. Application for guardianship should be made to the county judge in accordance with Chs. 744, 745 and 746, F. S. In lieu of applying for a tax deed sale and a tax deed the holder of a tax lien and tax sale certificate may foreclose the same in a court of equity, which would probably be advisable where the owner is insane and to secure a marketable title.

The above observations seem to furnish the answer to the above question.

057-120—May 9, 1957

COUNTY ORGANIZATION, OFFICERS & REGULATIONS

DEPOSITORIES FOR COUNTY FUNDS—SECURITY

REQUIRED—HOUSING AUTHORITY—§§136.01,

237.32(1), (4), 518.09, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are housing authority bonds eligible, under §518.09, F. S., as security for deposits of county funds, including school funds, in county depositories?

For banks to qualify as depositories of county funds, or county school funds, they are required by §§136.01 and 237.32, F. S., to make satisfactory deposit to the credit of the county or the school board the bonds and securities mentioned in said sections, which do not expressly include bonds or other obligations issued by housing authorities. Section 136.01, F. S., was last amended in 1951 and §237.32, in so far as it relates to the question, was a part of a 1939 act; said §237.32(4) was amended in 1955; however, the

above mentioned provision is a part of subsection (1) and not a part of said subsection (4).

Section 518.09, F. S., which was derived from a 1939 act and amended in 1953, provides, among other things, that bonds and other obligations issued by a housing authority, "when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States Government, or an agency thereof, . . . shall be authorized security for all public deposits . . ." It is the declared purpose of this section to authorize . . . political subdivisions . . . to use any . . . funds held on deposit, for the purchase of any bonds or other obligations" issued by housing authorities under the above conditions. County funds, including county school funds, seem to be "public funds" within the above statute, and the deposits of them are public deposits (37 C. J. S. 1404, notes 35 and 36).

Section 518.09, F. S., seems to be the subsequent law and is not necessarily in conflict with §§136.01 and 237.32, even should said §518.09 be not considered as the subsequent statute in point of time. This seems to call for an affirmative answer to the above stated question.

057-121—May 10, 1957

TAXATION

LICENSES AND LICENSE TAXES—COLLECTION—TAX WARRANTS OR EXECUTIONS—SERVICE—§§205.10, 205.12 AND 205.63, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a tax warrant or execution be issued and enforced, as provided in §205.10, F. S., for the collection of delinquent license taxes due under §205.63, F. S., where the taxpayer is a nonresident of the county or cannot be found in the county?

In the absence of a statute providing otherwise delinquent license taxes should be enforced by ordinary civil actions (Johnson v. Armour, 31 Fla. 413, 12 So. 842, text 845); however, statutes may provide a summary remedy against the taxpayer's property for the collection of license and occupation taxes, such as the seizure and sale of the taxpayer's property (53 C. J. S. 691, §54; 33 Am. Jur. 391, §78). Tax warrants or executions for the collection of license taxes bear a close relation to warrants or executions for the collection of ad valorem taxes (see 84 C. J. S. 1366-1369, §§687-692; 51 Am. Jur. 859, §981).

Section 205.12, F. S., provides for the issuance and enforcement of tax warrants or executions for the collection of delinquent license taxes. These tax warrants or executions are to be "directed to all and singular the sheriffs of the state, commanding them and each of them to levy upon and sell any real or personal property of the person liable for said tax within his respective jurisdiction for the amount thereof and costs of executing the warrant." Generally the proceedings upon these tax warrants or executions are to be the same as upon executions issued upon judgments of the circuit courts of the state. Any officer receiving such a tax warrant or execution should acquaint himself with said §205.12, F. S.

Except where the statutes so require there seems to be no requirement that notice or demand be made on the taxpayer before his property may be seized on execution. This same rule seems to be applicable to tax warrants or executions issued under §205.12, F. S. However, we feel that the taxpayer, if his name and address be known to the sheriff or the tax collector, should be furnished by mail or otherwise, a copy of the tax warrant or execution together with a copy of the sheriff's return as well as a copy of the notice of execution sale, without delay so that he may take such steps as he may deem proper to protect his property should he deem the license tax invalid.

The above observations, statutes and authorities seem to answer the question in the affirmative, subject, however to certain suggestions made above.

057-122—May 13, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—APPLICATION OF CH. 517, F. S.,
TO COUNTY OF SELLER'S RESIDENCE—CH. 517, F. S.

To: Florida Securities Commission, Tallahassee

QUESTIONS:

1. Is Ch. 517, F. S., applicable to sales of securities in the county of the residence of the issuer or seller?
2. If the 1st question is answered in the negative, then may an issuer or seller voluntarily register his securities?

The 1st question appears to have been raised because of the opinions in *Mortgage Holding Corp. v. Summy*, 97 Fla. 403 and 409, 121 So. 473, 122 So. 274, wherein it is stated that no compliance of the statutes then regulating the sale of securities was required when the sale was made in the county of the residence of the seller. Our examination of the case reveals that it involved §§4065-4073, R. G. S., 1920, which was derived from Ch. 6422, 1913, regulating the sale of securities in this state. These statutes were repealed by §23, Ch. 14899, 1931, by which chapter the present statutes (Ch. 517, F. S.) regulating the sale of securities in this state was derived.

Finding no provision in the present statutes (Ch. 517, F. S.) regulating the sale of securities in this state exempting sales of securities in the home county of the issuer and the statutes which were the basis for the opinion in *Mortgage Holding Corp. v. Summy*, supra, having been repealed, the 1st question must be answered in the affirmative. The 1st question having been answered in the affirmative, no answer to the 2nd question is deemed necessary.

057-123—May 15, 1957

ELECTORS AND ELECTIONS
PRESERVATION OF BALLOTS—§101.50, F. S.

To: Tom W. Pate, Supervisor of Registration, Arcadia

QUESTION:

How long after an election should ballots be preserved?

The law presently in effect does not prescribe any set time for the preservation of the ballots after the canvass of an election. Inasmuch as there is no statute definitely prescribing the procedure for preserving and destroying ballots, the propriety of doing so becomes somewhat discretionary with the election supervisor.

In an attempt to guide you along such lines, I refer you to §101.50, F. S. which provides that all signature identification slips used where voting machines are in use shall be preserved by the supervisor for at least one year. Since the law requires the preservation of identification slips for a year, it would appear that ballots should be preserved for at least the same length of time.

Former laws of the state which have been repealed did at one time require that ballots be preserved for a period of two years. A check with other election supervisors reveal that it is general policy to keep ballots for a period of two years where space is available, or for a period of at least one year in any case.

It is pointed out that in any case where court action or litigation is pending which involves an election, the ballots which pertain to the case in issue should be retained for use in evidence by the courts until the date of final litigation.

The foregoing observations appear to answer your question.

057-125—May 22, 1957

SHERIFFS

FEES AND MILEAGE FOR REMOVAL OF PRISONER TO AND FROM CLINIC FOR TREATMENT—§30.23, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Where prisoners are moved from their cells to another room within the barred confines of the jail, maintained and referred to as the "clinic," for examination and treatment, and thereafter returned to their cells, is the sheriff entitled to fees and mileage, as provided in §30.23, F. S., for removing prisoner to and from hospital for examination and treatment?

Section 30.23, F. S., among other things, provides fees and compensation to the sheriff for committing prisoner to jail, for recommitting prisoner to jail under order, releasing prisoner, removing prisoner to or from jail, *removal of prisoner to or from hospital or treatment center for examination or treatment including mileage therefor*. A "jail" has been defined as a building designated by law or used for the confinement or detention of prisoners, and may include the dwelling area of the jailer in charge (72 C. J. S. 850, §1; see also 23 Words and Phrases 7; 33 Words and Phrases, 652). The clinic inside the building constituting the jail does not constitute a hospital within its usual meaning (19 Words and Phrases, 658; Blacks law dictionary; Ch. 155, F. S.; 41 C. J. S. 331, §1). Technically speaking a clinic is not a hospital (New York Life Ins. Co. v. Ince, Mo., 27 S. W. 2d 476). The statute also uses the term "treatment center"; we do not think that the clinic located in the jail and maintained by the sheriff's office is a treatment center within the said statute.

We, therefore, conclude that under the circumstances men-

tioned in the above question there has been no removal of the prisoner to a hospital or treatment center from the jail. The above question is answered in the negative.

057-126—May 21, 1957

TAXATION

STATE TAX CERTIFICATES—FORECLOSURE BY COUNTY—
PARTICIPATION OF HOLDER IN FUNDS DERIVED
FROM SALE—§§192.352, 192.47 AND 194.78, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are individual holders of state tax certificates issued in 1934 or prior years because of nonpayment of taxes for 1933 or prior years taxes and subsequently assigned to said holders under the provisions of Ch. 18296, 1937, prior to June 9, 1939, entitled to a pro rata share of the proceeds from the sale of the land covered by said certificates when the land was acquired by a county under foreclosure proceedings provided by §194.47, F. S., prior to June 30, 1956, the effective date of §192.352, F. S.?

In your request for an opinion, you state that 1933 tax certificates were assigned to individuals in May and June of 1939 and the lands covered by said certificates were acquired by the county on June 1, 1945, pursuant to foreclosure proceedings, as authorized by §194.47, F. S. The certificates were not 20 years old at the time of foreclosure but were 20 years old when the lands were sold by the county.

Prior to the time title to the lands vested in the county, on June 1, 1945, the holders of said certificates could have enforced against the lands the lien or liens created by these certificates. However, after the county acquired title on June 1, 1945, pursuant to §194.47, F. S., the holder of such tax sale certificates could not enforce them against the lands foreclosed. The right of individual holders of county tax sale certificates upon such lands "... shall be restricted and confined solely to the right to participate in the proceeds received from said lands upon the sale thereof by the board of county commissioners as herein provided, pro rata, in the same proportion which the amount of the tax lien represented by such individual tax sale certificates bears to the amount of tax liens of equal dignity held by the county, or other taxing units, at the time of expiration of such two-year period; provided, however, that in no event shall such individual tax sale certificate participate in such proceeds and receive a larger amount than would have been required to be paid to redeem such certificate on the date the said two-year period expired." (§194.47(6), F. S.)

Inasmuch as the certificates were not 20 years old at the time of foreclosure by the county, we do not believe that §194.58, F. S., bars the holder thereof from his right to participate in funds derived from the sale of the lands acquired by foreclosure on June 1, 1945, since there was nothing the holder could enforce the certificates against until the lands were sold. Neither do we think that §192.352, F. S., which provides for the cancellation by the clerk immediately after June 30, 1956 of all tax sale certificates

sold under Ch. 18296, 1937, prevents the holder of such certificates from participating in the proceeds derived from the sale of lands covered by said certificates. Therefore, it is our opinion that the holder of such certificates is entitled to participate in the proceeds derived from the sale of the lands covered by the certificates referred to in your request for an opinion.

Your question is answered in the affirmative.

057-128—May 23, 1957

RETIREMENT

RETIREMENT OF UNIVERSITY TEACHERS UNDER §112.05, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a teacher, who has rendered 30 consecutive academic years of service in colleges or universities of this state, who is less than 70 years of age, retire under §112.05, F. S.?

"Whenever any state official or employee, irrespective of age, has served the state, as either an official or employee or both, for thirty consecutive years or more, or for as much as an aggregate of thirty-five years or more, such official or employee may retire from his office as such official or employee with the right to be paid, and shall be paid monthly on his own requisition, during the remainder of his natural life one-half of the amount of the average monthly salary received during the last ten years of such service . . ." (§112.05, F. S.). Do these references to "consecutive years" and "aggregate years" mean 12-month years and exclude academic school years, followed for many years in the employment of the teaching staff of our colleges and universities, or does it include academic years as well? For many years in this state persons who engaged in the profession of teaching in the schools of this state (the public free schools and the colleges and universities) were employed and paid on the basis of a nine or 10-month school year. Their work year was nine months instead of 12 months as in other state employment.

The attorney general (1945-1946 B. R. 209 et seq.) after examining the minutes and records of the state board of control, relative to the employment of college and university teachers, held them eligible for retirement under §112.05, F. S.; evidently, holding an academic year within the purview of said §112.05, F. S. Opinions of Sept. 26, 1955 and Dec. 27, 1955 (055-247 and 340; 1955-1956 B. R. 324 and 448) indicate a like construction of said §112.05. Although a large majority of regular state employees may be employed and paid on a 12-month basis, it does not follow that all regular state employees are employed and paid on that basis. The field of education has dictated a nine-month term and a nine-month employment for teachers for many years last past, which was well known to the legislature when the statutes from which §112.05 was derived were enacted and when they were codified into said section.

We are, therefore, of the opinion that there was no intention on the part of the legislature, in enacting §112.05 and the statutes from which it was derived, to exclude any class of regular em-

ployees of the state, such as the teaching staff of the colleges and universities of the state, merely and only because their regular employment was on an academic year instead of a 12-month year basis.

The above question is answered in the affirmative.

057-129—May 23, 1957

TAXATION

EXEMPTION—HOUSING MAINTAINED FOR PERSONNEL OF CHARITABLE HOSPITAL— §192.06; §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where housing is maintained and used by an eleemosynary or nonprofit corporation or association, to house the personnel, or a part thereof, of a charitable hospital or sanitarium in this state, is such property entitled to tax exemption?

For the purposes of this opinion we shall presume that the hospital or sanitarium is such as to entitle it to tax exemption under §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., in that such hospital or sanitarium is held and used exclusively for some "religious, scientific, municipal, educational, literary or charitable purposes." Under these constitutional and statutory provisions *ownership and utilization* of the property are the criteria for determining its exemption from taxation (*Riverside Academy v. Watkins*, 155 Fla. 288, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78). Ownership alone is not sufficient for tax exemption, there must be utilization for one or more of the purposes mentioned in the state constitution. This being true, the question becomes primarily one of fact and not of law.

The above statute and constitutional provisions grant tax exemption to such property as may be held and used exclusively for charitable and other named purposes; it is not the intention of the law to grant exemption from taxation to property held for charitable and other purposes. (See *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750). In *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78, although the property may have been used for some purposes within the purview of the above constitutional and statutory provisions, it was also held for other purposes not within said constitutional and statutory provisions; the court held that it was not entitled to tax exemption. In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, certain fraternal association properties were rented; however, the rents were used to pay off an indebtedness of the association instead of being used for one or more of the purposes mentioned in the above statutes and constitutional provisions; the court held the property not entitled to tax exemption.

We gather from the above mentioned Florida cases and the cases collected in an annotation in 15 A. L. R. 2d 1075 and 1076, that for housing facilities for charitable, as well as other institutions mentioned in the above constitutional provisions and stat-

utes, to be entitled to tax exemption the particular facility must be necessary for the efficient operation of the organization claiming the exemption as a part thereof. Such personnel must be required to reside on the hospital grounds or nearby and subject to immediate call at all times to meet such requirements. Although residence on or near the hospital grounds may be desirable, unless such residence is necessary no tax exemption should be allowed. To all intents and purposes the facility must be a part of the hospital. The facts presented by the record before us do not seem to indicate any right to tax exemption; however, we fear that full facts are not presented.

Mere ownership of property by a hospital association does not entitle the property to tax exemption; there must not only be ownership but there must be an actual use for charitable purposes. The above stated question not being answerable from the facts before us, we have attempted to provide a formula for its answer. The tax assessor must from all the facts and circumstances determine whether the facility is being used as a part of the hospital operation, as a necessity for the proper operation of the hospital, or as a home, rooming house or boarding house as an accommodation only.

057-130—May 23, 1957

INSURANCE

SURETIES AND SURETY COMPANIES—RETURN OF DEPOSIT UNDER §648.02, F. S.—§§648.10, 648.11 AND 631.06, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

A foreign insurance company heretofore received certificate of authority to engage in a number of lines of insurance in this state, including the issuing of fidelity and surety bonds, and in connection with such surety business deposited with the insurance commissioner \$85,000 par value U. S. treasury bonds in pursuance of §648.02, F. S. It now desires that in the renewal of its certificates of authority there be deleted therefrom the right to engage in such surety business, and requests return to it of said deposit. If there is filed with the commissioner evidence that the company has not issued any fidelity or surety bonds in this state, may the commissioner return to the company said deposit?

The certificate of authority heretofore issued this company authorized it to engage in the following lines of insurance in this state: auto bodily injury and property damage; automobile physical damage and collision; burglary; fidelity and surety; general liability; inland marine; fire and allied lines; and plate glass. In addition to making the \$85,000 deposit required of it with respect to the surety business, the company has also met the requirements for fire insurance companies imposed by §631.06, F. S.

Companies which "offer or undertake to become surety on any bond or other surety contract" are required to deposit with the commissioner bonds, as described, of the market value of

\$75,000, to be returned by the commissioner to such a company when it ceases to do business in this state and has settled up all claims against it, as provided in Ch. 648, F. S. (§648.02). Further references are made to said deposit in §§648.10 and 648.11.

Attached to the file which accompanied the request for opinion is an instrument executed by the president and secretary of this company, designated an affidavit but which is in reality a certificate. Among other things these officers "swear and affirm that, to the best of our full knowledge, belief and understanding, the . . . Company has not at any time issued Fidelity or Surety Bonds within the State of Florida and that, accordingly, the . . . Company has no liability, fixed or contingent, which has attached or could attach to said Bonds (i. e., deposit)." An affidavit in like terms should be substituted for this certificate.

In *State ex rel Union Indemnity Co. v. Knott*, Fla., 143 So. 221, the question raised was the authority of the state treasurer's refusal to release \$75,000 in bonds deposited by N. Y. Indemnity Co. under §6302, C. G. L. (see §648.02, F. S.), Union Indemnity Co. having reinsured the other company's liability in "outstanding and uncanceled policies of insurance and uncanceled fidelity and surety bonds." It was contended by the state treasurer that it did not appear that N. Y. Indemnity Co. had been relieved of liability under an automobile public liability policy issued by it to Florida Motor Lines, Inc., hence that the deposit should be retained. The court in its original opinion referred to the language in §6302 C. G. L. (§648.02, F. S.) and stated that it applied to "any surety company or to any insurance company . . . which may offer or undertake to become surety on any bond or . . . to become surety on any surety contract;" and the court held that "a liability insurance policy is a surety contract." On rehearing, the court stated: "In the original opinion in this case we said: 'New York Indemnity company wrote the liability insurance and became surety for the liability of Florida Motor Lines, Incorporated, *under its authority to do a surety business in the State of Florida* and by . . . Section 6304, C. G. L. it is estopped to deny its corporate power to assume liability.' It may be more correct to say: 'New York Indemnity Company wrote the liability insurance and thereby bound itself to indemnify Florida Motor Lines, Incorporated, under certain conditions named in the contract, policy or bond under its authority to do business in this state as provided in Chapter 4671, Acts of 1899, as amended by Chapter 7867, Acts of 1919, and Chapter 12321, Acts of 1927, the same being Compiled General Laws, Sections 6300 to 6306, Comp. Gen. Laws, inclusive, and by such statutes it is estopped to deny its corporate power and authority to execute and deliver such contract, policy or bond.'"

Is this case to be construed to the effect that where a multiple-lines company qualifies to engage in the surety business and, among others, engages in the casualty insurance business issuing policies of the nature described in the case, that such types of coverage are surety contracts within the meaning of our statutes and in relation to such deposit? The wording of the opinion is not too clear; but since the authority of N. Y. Indemnity Co. is stated to have derived §§6300 to 6306 C. G. L., (relating to the surety business) it is assumed without question that the liability insurance policy ("contract, policy, or bond") was issued

under its qualification to engage in business as a surety company. It is quite apparent that no deposit was then or is now required of a casualty insurance company to engage in that line of business in this state.

In view of the foregoing, in my opinion the question is answered as follows:

There is no statutory procedure to be followed prerequisite to the commissioner's releasing a deposit as here involved, other than the statutory requirement that claims shall be settled. We feel that when an affidavit duly sworn to by the officers who signed the above described certificate, in the same wording as used in the certificate, is delivered to the commissioner, together with the commissioner's receipt for said bonds, that officer will be justified in surrendering and delivering to said insurer the \$85,000 in securities above described. We feel that the words in said certificate, "to the best of our full knowledge, belief and understanding," are, as a matter of common honesty, as positive a statement as can be made. The finding in the above Union Indemnity Co. case that "a liability insurance policy is a surety contract," is of no significance here.

057-131—May 23, 1957

CRIMINAL PROCEDURE

VENUE FOR PROSECUTIONS OF VIOLATORS OF LAWS,
RULES AND REGULATIONS OF THE GAME AND FRESH
WATER FISH COMMISSION IN RELATION TO CER-
TAIN LAKES AND RIVERS IN THE STATE—§§46.06,
372.021, 372.07, 910.03 AND 932.11, F. S.

To: A. D. Aldrich, Director, Game and Fresh Water Fish Commission, Tallahassee

QUESTIONS:

1. What is the venue for prosecutions against persons taking game and fresh water fish from around, or in, the waters of Lake Okeechobee in violation of the statutes, rules and regulations, governing the taking of game and fresh water fish in this state?

2. What is the venue for prosecutions against persons taking game and fresh water fish from rivers and streams forming county boundaries in violation of the statutes or rules and regulations governing the taking of game and fresh water fish in this state?

AS TO QUESTION 1:

Your query describes a specific factual situation as to the proper county for jurisdiction of a cause wherein a wildlife officer makes an arrest on the south side of Lake Okeechobee. The question then becomes whether or not the arresting officer could take the case to Okeechobee county, Martin county, or any other county where the jurisdiction of the county court extends to the bank of Lake Okeechobee.

Although your question is phrased in terms of §46.06, F. S., relating to jurisdiction over navigable waters, the proper governing statute would be §932.11, F. S., relating to jurisdiction and venue in criminal prosecutions as concerns such navigable waters. The latter statute specifically provides for territorial

jurisdiction of any court in any county forming a border to any navigable water in criminal causes, and thus concurrent jurisdiction to any of the courts bordering said navigable waters is clearly established. However, there inherently appears to exist an important restriction to the operation of this statute in that its purpose is to grant jurisdiction across said navigable waters only when it is uncertain as to which county the offense was committed in. See 22 C. J. S., Criminal Law, §178. Thus, in view of the statutory provisions of §§372.021, 372.07, 910.03 and 932.11, F. S., as restricted by §11, declaration of rights, constitution of Florida, it becomes apparent that concurrent jurisdiction over navigable waters exists only when there is some uncertainty as to which county the offense was committed in. It is my view that the intention of the statute is to the effect that where doubt exists as to within which county boundary the offense was committed, then and then only may the court of any bordering county have jurisdiction of the offense under the statute. Thus, if there exists no reasonable degree of uncertainty as to within which county the offense was committed, the prosecution must take place in the county where the crime was committed.

Therefore, in answer to your question 1, it becomes clear that §932.11, F. S., operates only when there is uncertainty as to within which county the offense was actually committed; but if there be no doubt as to the place of the offense, the constitutional and statutory provisions make it mandatory that the trial in such criminal prosecutions be in the county where the crime was committed.

AS TO QUESTION 2:

If your descriptive reference in your question 2 refers to bodies surrounded entirely by Florida counties, my answer would be the same as in question 1, *supra*, to the effect that §932.11, F. S., would apply only if there existed some doubt as to the place of the offense. However, if your question comprehends bodies of water which are bordered by a state other than Florida, then it would appear that jurisdiction would be lacking for prosecution in any county of the sister state unless an interstate compact existed for such prosecution.

These above observations appear to answer both your questions.

057-132—May 27, 1957

LEGISLATION

EFFECTIVE DATE OF ACT BECOMING LAW WITHOUT GOVERNOR'S APPROVAL—§28, ART. III, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where an act of the legislature was presented to the governor of this state, on May 16 at 10:10 in the forenoon, and was filed by the governor on May 23 at 10:30 in the forenoon in the office of the secretary of state of Florida, when did the said act become a law and become effective?

Section 28, Art. III, State Const., insofar as here material, provides that "if any bill shall not be returned within five days

after it shall have been presented to the Governor, (Sunday excepted) the same shall become a law, in like manner as if he had signed it." Section 21, Art. IV, State Const., provides that "the Secretary of State shall keep the records of official acts of the Legislative and the Executive Departments of the Government. . . ." The act in question provided that it would "become effective immediately upon becoming a law."

In computing time the first day should be excluded and the last day included. (*Silvernail v. American Fire and Casualty Co.*, Fla., 80 So. 2d 707, text 708; *Scarlett v. Frederick*, 147 Fla. 407, 3 So. 2d 165; *Young v. Young*, 152 Fla. 712, 24 So. 2d 885). The constitution, when counting the time under said §28, Art. III, excludes Sundays coming within the five day period. The act having been presented to the governor on the 16th, said date should be excluded and the count begins with the 17th; however, we find that a Sunday, the 19th, falls within the said five days. Therefore, the 17th, 18th, 20th, 21st and 22nd are the 1st, 2nd, 3rd, 4th and 5th days. The said five day period of time expired on the 22nd. As a general rule, in the computation of time, a day is to be considered as an indivisible unit or period of time (86 C. J. S. 900, §16, *Crawford v. Feder*, 27 Fla. 523, 8 So. 642). It therefore appears that the five days mentioned in §28, Art. III, State Const., as to the act mentioned therein, expired at midnight at the end of the 22nd. It became a law on the moment of the beginning of the 23rd.

These observations seem to answer the above question; however, it may be that the public was not charged with constructive knowledge of the act until it was filed in the office of the secretary of state, yet a person having actual knowledge of the existence of the act would probably be bound by it from the time it became a law.

057-133—May 27, 1957

ELECTORS AND ELECTIONS

EXECUTIVE COMMITTEES—ACCOUNTING OF FUNDS AND ELECTION OF MEMBERS—§§99.161(9)(a) AND 103.111(3), F. S.

To: *George B. Cruden, Chairman, Republican Executive Committee, Delray Beach*

1. Does the organization referred to in the 1st sentence of §99.161, F. S., include a club such as a Republican club which is permanently operated?

2. If the answer to question 1 is in the affirmative, for how long a period before the date of filing its 1st report should the report cover?

3. For how long a period before its 1st report must a county executive committee account for its receipts and expenditures?

4. Are the vacancies mentioned in §103.111(3), F. S., to be filled by a majority vote of the attending members of the executive committee of the precinct wherein the vacancy occurs?

AS TO QUESTION 1:

It is my opinion that a club which is permanently operated

jurisdiction of any court in any county forming a border to any navigable water in criminal causes, and thus concurrent jurisdiction to any of the courts bordering said navigable waters is clearly established. However, there inherently appears to exist an important restriction to the operation of this statute in that its purpose is to grant jurisdiction across said navigable waters only when it is uncertain as to which county the offense was committed in. See 22 C. J. S., Criminal Law, §178. Thus, in view of the statutory provisions of §§372.021, 372.07, 910.03 and 932.11, F. S., as restricted by §11, declaration of rights, constitution of Florida, it becomes apparent that concurrent jurisdiction over navigable waters exists only when there is some uncertainty as to which county the offense was committed in. It is my view that the intention of the statute is to the effect that where doubt exists as to within which county boundary the offense was committed, then and then only may the court of any bordering county have jurisdiction of the offense under the statute. Thus, if there exists no reasonable degree of uncertainty as to within which county the offense was committed, the prosecution must take place in the county where the crime was committed.

Therefore, in answer to your question 1, it becomes clear that §932.11, F. S., operates only when there is uncertainty as to within which county the offense was actually committed; but if there be no doubt as to the place of the offense, the constitutional and statutory provisions make it mandatory that the trial in such criminal prosecutions be in the county where the crime was committed.

AS TO QUESTION 2:

If your descriptive reference in your question 2 refers to bodies surrounded entirely by Florida counties, my answer would be the same as in question 1, *supra*, to the effect that §932.11, F. S., would apply only if there existed some doubt as to the place of the offense. However, if your question comprehends bodies of water which are bordered by a state other than Florida, then it would appear that jurisdiction would be lacking for prosecution in any county of the sister state unless an interstate compact existed for such prosecution.

These above observations appear to answer both your questions.

057-132—May 27, 1957

LEGISLATION

EFFECTIVE DATE OF ACT BECOMING LAW WITHOUT GOVERNOR'S APPROVAL—§28, ART. III, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where an act of the legislature was presented to the governor of this state, on May 16 at 10:10 in the forenoon, and was filed by the governor on May 23 at 10:30 in the forenoon in the office of the secretary of state of Florida, when did the said act become a law and become effective?

Section 28, Art. III, State Const., insofar as here material, provides that "if any bill shall not be returned within five days

after it shall have been presented to the Governor, (Sunday excepted) the same shall become a law, in like manner as if he had signed it." Section 21, Art. IV, State Const., provides that "the Secretary of State shall keep the records of official acts of the Legislative and the Executive Departments of the Government. . . ." The act in question provided that it would "become effective immediately upon becoming a law."

In computing time the first day should be excluded and the last day included. (*Silvernail v. American Fire and Casualty Co.*, Fla., 80 So. 2d 707, text 708; *Scarlett v. Frederick*, 147 Fla. 407, 3 So. 2d 165; *Young v. Young*, 152 Fla. 712, 24 So. 2d 885). The constitution, when counting the time under said §28, Art. III, excludes Sundays coming within the five day period. The act having been presented to the governor on the 16th, said date should be excluded and the count begins with the 17th; however, we find that a Sunday, the 19th, falls within the said five days. Therefore, the 17th, 18th, 20th, 21st and 22nd are the 1st, 2nd, 3rd, 4th and 5th days. The said five day period of time expired on the 22nd. As a general rule, in the computation of time, a day is to be considered as an indivisible unit or period of time (86 C. J. S. 900, §16, *Crawford v. Feder*, 27 Fla. 523, 8 So. 642). It therefore appears that the five days mentioned in §28, Art. III, State Const., as to the act mentioned therein, expired at midnight at the end of the 22nd. It became a law on the moment of the beginning of the 23rd.

These observations seem to answer the above question; however, it may be that the public was not charged with constructive knowledge of the act until it was filed in the office of the secretary of state, yet a person having actual knowledge of the existence of the act would probably be bound by it from the time it became a law.

057-133—May 27, 1957

ELECTORS AND ELECTIONS

EXECUTIVE COMMITTEES—ACCOUNTING OF FUNDS AND
ELECTION OF MEMBERS—§§99.161(9)(a) AND
103.111(3), F. S.

To: *George B. Cruden, Chairman, Republican Executive Committee, Delray Beach*

1. Does the organization referred to in the 1st sentence of §99.161, F. S., include a club such as a Republican club which is permanently operated?

2. If the answer to question 1 is in the affirmative, for how long a period before the date of filing its 1st report should the report cover?

3. For how long a period before its 1st report must a county executive committee account for its receipts and expenditures?

4. Are the vacancies mentioned in §103.111(3), F. S., to be filled by a majority vote of the attending members of the executive committee of the precinct wherein the vacancy occurs?

AS TO QUESTION 1:

It is my opinion that a club which is permanently operated

would fall within the category of organizations mentioned in the 1st sentence of §99.161(9)(a), F. S., if it is organized to support a political candidate or party. I answer this question in the affirmative because of the all-inclusive words "... or other committee ..." found in subsection (9)(a) of the above statute. In addition, I find no other statute directed toward the financial regulation of such an organization.

AS TO QUESTION 2:

I direct your attention to the 2nd sentence of subsection (9)(a) of the above mentioned statute which states "Each such executive committee, organization, group, or other committee shall make a full and complete report of all moneys. . . ." I interpret this phrase as meaning that such an organization must make a complete financial report and in order to do so it would appear that it is the duty of the organization to report all transactions which have taken place between the last reporting date and the reporting date in question. If the organization be a new one, then the organization should report all transactions back to and including the original transaction.

Inasmuch as the same statute governs clubs such as yours and executive committees, the accounting procedures are the same; hence, the answer to question 2 is applicable to question 3.

In my opinion, the phraseology set out in question 4 clearly interprets §103.111(3), F. S., and the answer to this question is in the affirmative.

057-134—May 28, 1957

TAXATION

TAXABILITY OF CONSTRUCTION MACHINERY AND EQUIPMENT OF NONRESIDENT USED IN THIS STATE—

§192.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is construction machinery and equipment of non-residents in this state on Jan. 1 of any tax year subject to taxation in this state?

"Unless expressly exempted from taxation, all real and personal property in this state, and all personal property belonging to persons residing in this state, shall be subject to taxation in the manner provided by law" (§192.01, F. S.). The tax day in Florida is Jan. 1 of the tax year (§192.04, F. S.). In the taxation of tangible personal property the tax assessor may be confronted with property permanently located at the domicile of its owner, property permanently located at a place other than the domicile of the owner, and property transiently present at a place other than the domicile of the owner. We are not here dealing with tangible personal property having a situs at the domicile of its owner, but with property having either a permanent or transitory situs at a place other than the owner's domicile.

It has always been held, assumed and conceded that tangible personal property having an *actual situs* in a state, is there taxable, regardless of the foreign domicile of its owner, the theory being that inasmuch as the property enjoys the protection of the state,

it must be made to contribute to its maintenance (Annotation 110 A. L. R. 715-717). The courts are in agreement that before tangible personal property may be taxed in a state other than the domicile of its owner, *it must acquire there a location more or less permanent*. It is difficult to define the idea of permanency that this rule connotes. It is clear that "permanency," as used in this connection, does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status. Permanency seems to exclude "property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time" (see *City Bank Farmers' Trust Co. v. Schnader*, 8 Fed. Supp. 815). In *Irvin v. New Orleans St. L. & C. R. Co.*, 94 Ill. 105, 34 Am. Rep. 208, the court said that, in determining permanency within this rule, the ownership of the property, the uses for which it is designed and the circumstances of it being in the state are so various as to prevent the formulation of a general rule applicable to all cases.

Property in transit is usually held not subject to taxation in the place where it may be on the tax day (Annotation 110 A. L. R. 724-726). As to the taxation of construction machinery and equipment used in a state other than that of the owners' domicile, some states have held that there was not sufficient permanency to authorize taxation (see cases in Annotation 110 A. L. R. 714) while in others the reverse has been held (see cases in Annotation 110 A. L. R. 728). "The ownership and uses for which the property is designed, and the circumstances of its being in the state, are so various that the question is often more a question of fact than of law" (51 Am. Jur. 469, §455, note 19). The situs of such property has been said to be where "in the ordinary course of business that property is present and being used and employed with a consistent continuity and not spasmodically and temporarily" (84 C. J. S. 226, Section 115). In *Arundel Corp. v. Sproul*, 136 Fla. 167, 186 So. 679, the dredging equipment taxed had been brought into the state about June of 1934, was in the state on Jan. 1, 1935, when assessed for tax purposes, and remained in the state until about December 1935. Under these circumstances it was held to have acquired a situs in this state for tax purposes. In *Bush v. Dade County*, 140 Fla. 277, 191 So. 515, the yacht, although owned by a nonresident, had been in the state for about seven years. These two Florida cases seem to have applied the rules hereinabove referred to. In each case the property had been located and used for a sufficient period of time to clearly show a more or less permanent location in this state.

No sufficient facts appear from the record before us upon which to answer the above question; we can only advise that if the property in the question had, prior to Jan. 1 of the tax year, acquired a more or less permanent location or situs in this state, that the question should be answered in the affirmative; but if it was only temporarily and transiently within the state on said Jan. 1, and had not acquired a more or less permanent location in the state, it should be answered in the negative. The question is primarily one of fact to be determined by the tax assessor.

057-135—May 29, 1957

LABOR

WORKMEN'S COMPENSATION—INDEMNITY BONDS FOR
SELF-INSURERS—§§440.38 AND 440.52, F. S.To: James T. Vocelle, Chairman, Florida Industrial Commission,
Tallahassee

QUESTIONS:

1. May the industrial commission authorize and designate the specific company or companies whose indemnity bonds may be accepted by the commission in connection with the applications from employers to become self-insurers pursuant to Ch. 440, F. S.?

2. May the industrial commission limit the total liability guaranteed by any one surety company insofar as it applies to indemnity bonds?

AS TO QUESTION 1:

It is my belief that the statutes currently in effect infer that the industrial commission may eliminate certain bonding companies from participation if the bonding companies fail to meet minimum standards set up by industrial commission rules and regulations pertaining to assets, net worth and the like regarding the companies' ability to meet their bond obligations. Section 440.38(1)(b), F. S., states as follows: "The commission may, as a condition to such authorization, require such employer to deposit in a depository designated by the commission either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the commission, *and subject to such conditions as the commission may prescribe. . .*" (Emphasis supplied.) The phraseology used in this statute infers that the commission has the authority to subject both, the securities and/or indemnity bonds, to such conditions as necessity may warrant.

Section 440.52, F. S., requires insurance companies to register with the industrial commission prior to writing compensation policies and rule 3 of the rules for self-insurers established by the industrial commission describes the type of securities to be used by employers. Inasmuch as the insurance companies are subject to scrutiny by the commission as are the type of securities, I can see no reason why the industrial commission cannot require companies whose indemnity bonds may be accepted by the commission to be subject to similar scrutiny as provided for in the conditional phrase italicized in §440.38, F. S., set out above. These comments are not to be interpreted as a suggestion that the industrial commission has any *arbitrary* authority to authorize or designate any company whose bonds may be accepted or rejected. On the other hand, I do believe that the industrial commission can refuse to accept bonds offered by companies whose balance sheets do not meet legitimate requirements to be established by rules and regulations of the industrial commission. It appears then, that the answer to question 1 is a qualified yes in accordance with the above discussion.

AS TO QUESTION 2:

The answer to question 1 may be applied. The conditional phraseology outlined in §440.38(1)(b), F. S., is applicable, hence,

it appears that the total liability guaranteed by any one surety company could become a condition to be provided for in future rules for self-insurers established by the Florida industrial commission.

I hope the above information answers your questions.

057-136—May 30, 1957

INSURANCE

INSURANCE COMMISSIONER—REFUNDS OF EXAMINATION FEES UNDER §§627.81(4), (7), 636.42(2) AND 903.46(4), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. At what point is the examination fee of \$10, exacted of an applicant who desires to be licensed as a fire and casualty agent under §627.81(4), F. S., earned by the state so that refund of such amount is not required?

2. At what point is the application fee of \$10, exacted of an applicant for examination prescribed for insurance adjusters under §636.42(2), F. S., earned by the state so that refund of such amount is not required?

3. At what point is the examination fee of \$10, exacted of an applicant who desires to be licensed as a bail bondsman under §903.46(4), F. S., earned by the state so that refund of such amount is not required?

In his request for opinion, the commissioner states with respect to the fees paid under §§627.81(4) and 903.46(4), that heretofore it has been the policy that the fees paid were earned when the examination was taken; that he is confronted more and more with the problem of applicants failing to appear for the examination and later requesting refund of fees paid; that the comptroller will not honor a request for refund after lapse of a year from date of payment of the fee; that the licensing division of the commissioner's office "goes to the expense of investigating an applicant as required by law," and when it is determined that the applicant is eligible to take the examination, appropriate papers providing for such examination are assigned to the applicant and mailed to a field office; that once they have investigated an applicant, approved him for examination, and sent proper papers to the appropriate field office, those papers may not be assigned to another applicant since they are made out to the particular applicant and are filed in his permanent case history folder; and that reasonably it would appear that the state has fulfilled its responsibility to the applicant, in so far as the fee is concerned, when it approves the applicant's qualifications, assigns appropriate examination papers for his use, and notifies him that he may take the examination at a designated place.

An applicant for a fire and casualty agent's or solicitor's license, who is required to take the examination, must file with the commissioner the application required by §627.79, F. S. (agents) or by §627.80, F. S. (solicitors). Provisions of §627.81 relating to the taking of the examination are mentioned with subsections of that section noted. Should the commissioner determine from the application or his own inquiry that the appli-

cant is "unfit to be an agent or solicitor," the commissioner shall deny him the right to take the examination (1). Should the commissioner deem the applicant fit to take the examination, "the applicant shall be required to appear at a place . . . designated," to take the examination (2). Examinations shall be held "in the commissioner's offices where an adequate and designated examination room is available," and "each applicant shall be entitled to take the examination at such of said offices which is located closest to his place of residence" (3). "The fee for such examination shall be ten dollars payable to the commissioner by the applicant prior to his appearance for the examination" (4). The \$10 examination fee "shall apply to each examination" (7).

The provisions of §903.46, F. S., relating to bail bondsmen, are substantially the same as the provisions of §627.81 with respect to the taking of the examination and the fee paid.

The provisions of §636.42(2), F. S., relating to adjusters, are different, as pointed out in the answers.

In view of the foregoing in my opinion the questions are answered as follows:

1. Notice is taken of the fact that the fee paid by an applicant for examination under §627.81(4) is designated "a fee for such examination," and of the administrative construction heretofore employed resulting in the refunding of the fee where no examination is taken. We consider that reasonably such procedure is subject to modification. Chapter 627, F. S., regulates extensively fire, casualty and surety agents and solicitors. Before such an agent may be licensed, he must possess certain qualifications relating to character, education and/or experience; and among other things the successful taking of the examination, under stated circumstances, is prerequisite to the licensing of the applicant. The examination requires action on the part of the state and on the part of the applicant. The detailed information required of applicants for agents' or solicitors' licenses, as set forth in §§627.79 and 627.80 must be reviewed by the commissioner and, if doubt exists, the commissioner is charged with making an investigation concerning such doubtful aspects. If the application is approved, the procedures recited above concerning preparation of papers in connection with the examination, notification of the place the examination is to be held, submission of required papers to the proper field office, and fixing date applicant shall appear for the examination—all these constitute performance by the state of its full duties in relation to providing for such examination. A duty then devolves upon the applicant to present himself at the appointed time and place to take the examination.

Reasonably the \$10 examination fee is not a *revenue* tax but is a *regulatory* or *excise* tax relating to performance of duties by the commissioner with respect to his processing of applications for examinations and his giving of the same. For a distinction between these types of taxes, see *American Can Co. v. City of Tampa, Fla.*, 14 So. 2d 203. While not controlling here in and of itself, we consider that a provision in §644.05(3), F. S., relating to the licensing of health and accident agents expresses the legislative intent applicable to the statute here involved, which subsection is quoted as follows: "(3) If the person appointed as an agent is required to take an examination as hereinafter prescribed, such application

shall be accompanied by a filing fee in the amount of ten dollars. *Such fee shall not be refunded after the application has been processed and the applicant notified to appear for examination.*" (Emphasis supplied.)

In view of the nature of this tax and its purpose, when the commissioner has performed his full duty, and has arranged for an applicant to take the examination required by §627.81, and has notified the applicant of the time and place of the holding of the examination, if thereafter the applicant does not take the examination, the \$10 examination fee is earned and not subject to refund.

2. Section 636.42(2), F. S., relating to examination of persons seeking licenses as adjusters, provides that, "Each applicant for an examination within the purview of this chapter shall pay to the commissioner an application fee of ten dollars and the receipt of such fee shall be a condition precedent to the taking of the examination by the applicant." This is an *application* fee, and is an *excise* or *regulatory* tax. It is presumed without question that when the commissioner receives such an application he will perform his full duty with respect to it; and the fee is earned when the application is filed. No possible refund is involved.

3. The same reasoning and answer set forth in 1. above is applicable to this question.

057-137—May 30, 1957

COURTS

JUDGES—IMPEACHMENT—PAYMENT OF COMPENSATION
—GEORGE E. HOLT—HOUSE RESOLUTION 1942, 1957—
§29, ART. III, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What effect does the adoption of house resolution 1942 have upon the compensation of Circuit Judge George E. Holt?

The house of representatives of Florida on May 27, 1957, adopted house resolution No. 1942 by which articles of impeachment were placed against Circuit Judge George E. Holt (see Journal of the House of Representatives of May 27, 1957, pp. 1727 and 1728).

Thereafter, on the same date, the house of representatives adopted house resolution 1945, empowering the speaker of said body to appoint two members of the house as managers to conduct the impeachment proceedings against said Judge George E. Holt. (House Journal, pp. 1758 and 1759). Pursuant to said resolution, the speaker appointed Hon. Thomas D. Beasley and Hon. Andrew J. Musselman, Jr., managers, who, in the discharge of their duties, presented themselves on May 28, 1957, at the bar of the senate and announced that articles of impeachment had been passed by the house of representatives, filing the original of said articles of impeachment with the senate.

17 Encyclopedia of Pleading and practice, Public Officers, at p. 210 states:

The effect of the preferment of articles of impeachment against a judicial officer is to suspend him and thus

preclude him from exercising the functions of his office until the determination of the impeachment proceeding by acquittal.

The 2nd headnote In The Matter of the Executive Communication of the 9th of November, A. D. 1868, 12 Fla. 653, reads:

To constitute an impeachment so as to be effective under the Constitution *to suspend the officer*, the articles of impeachment must be presented to the Senate, and a constitutional quorum of the Senate must receive them. (Emphasis Supplied).

At p. 678 of the opinion by Randall, C. J., the court recognized "... that the Assembly deemed that an impeachment was not effective until an accusation should be actually declared before the Senate, which body alone is authorized to entertain it." An impeachment proceeding was likened to a proceeding by way of indictment in a criminal court, the opinion pointing out that an indictment is not in effect "until it is presented to the court in actual, open, and legal session, and received and filed therein." It was further stated that in light of the many precedents and authorities under constitutional provisions substantially the same as Florida's that "... we cannot, in considering this case, so far deviate from established principles, rules, and beaten paths as to recognize a declaratory resolution of the Assembly as constituting an effective impeachment, until the declaration of impeachment or accusation be made to and at the bar of the only tribunal authorized by the Constitution to receive and act upon it." Under the constitution "... all impeachments shall be tried by the Senate." (Art. III, §29, Fla. Const.).

So, from the above, it appears that the articles of impeachment do not take effect until they are presented to the senate, announcement of the accusation is made and these articles actually filed with the senate. That was accomplished on May 28, 1957. It, therefore, follows that Judge Holt is entitled to his compensation through and including May 28, 1957.

057-138—May 31, 1957

LEGISLATURE

TERMINATION OF 60-DAY LEGISLATIVE SESSION—NEW LEGISLATION—§2, ART. III, STATE CONST.

To: W. A. Shands, President of the Senate, Tallahassee

QUESTIONS:

1. Does the regular 60-day session of the Florida legislature, as limited by §2, Art. III, State Const., terminate at noon on the 60th day or at midnight or the end of said 60th day?

2. When a 60-day regular session of the legislature is extended in accordance with §2, Art. III, State Const., may additional legislation be introduced during the said extension and if so under what conditions?

Section 2, Art. III, State Const., provides that "regular sessions of the legislature may extend to sixty days" which language dates back to the adoption of the 1885 state constitution; however, by more recent amendment of the said section "the regular sixty-day biennial session of the legislature may, by a *three-fifths* vote

of the *membership of both houses*, be extended not exceeding a total of thirty days which need not be consecutive. Recesses in such extended session shall be taken only by joint action of both houses During such extended session, no additional proposed legislation shall be introduced unless consent is first obtained by a *two-thirds vote* of the members of the House into which it is sought to be introduced." (Emphasis supplied.)

In *State v. Davis*, 123 Fla. 41, 166 So. 289, text 298, the court, upon the question of signing of acts by the officers of the legislature after sine die adjournment, stated that "the death of the 1935 regular session of the legislature by constitutional limitations at *midnight on May 31, 1935*, did not defeat performance of its constitutional duty . . . to make an orderly disposition of its remains by properly winding up its affairs. . . ." In *State v. Davis*, 124 Fla. 592, 169 So. 199, text 209, the court observed that "the journals state that the legislative bodies severally adjourned sine die at noon on May 31, 1935; but as the legislature could legally have remained in session until 12 o'clock midnight May 31, 1935, the" (Emphasis supplied.)

These observations answer the 1st question by showing that the 60-day regular session of the legislature, in absence of an extension thereof according to the constitution or a previous adjournment, expires at midnight of the 60th day; that is to say, as applied to the present regular session, at midnight, May 31, 1957.

"The regular sixty-day biennial session of the legislature may, by a three-fifths vote of the *membership of both houses*, be extended not exceeding thirty days . . ." (Emphasis supplied.) This seems to require the joint action of the membership of both houses, which could well be by a concurrent resolution adopted by both houses by the required majority. The reference is to the membership of both houses; this seems to require a majority of the membership of both houses voting affirmatively for the extension. The membership of a house would seem to be all the members elected to the house, less any vacancies caused by death or otherwise. An absentee is to be considered as a member. The requirement is a vote of the membership and not a vote by a quorum. The requirement is not a majority of a quorum but a majority of the membership. When a session is extended by a vote required by the constitution, then the session of the legislature is continued and we see no reason for adopting a resolution fixing the time of sine die adjournment prior to the extension of the legislature, and feel that such a resolution may be passed during the extended period; however, we see nothing that would prevent the adoption of a resolution fixing a sine die adjournment prior to such extension, and further feel that should one be adopted prior to the extension it may be amended after extension.

Although all pending legislation would seem to be carried into the extended session (the extended session being a continuation of the 60-day session and not a special session) before new legislation may be introduced its introduction must be consented to by *two-thirds of the members* of the house into which it is sought to be introduced. This means two-thirds of the *entire membership* and not two-thirds of those present at the session when sought to be introduced.

These observations seem to answer the 2nd question.

057-139—June 3, 1957

TAXATION AND FINANCE

MOTOR FUELS—SAME PERSON, FIRM OR CORPORATION
AS WHOLESALER AND RETAILER—§§207.01 AND
208.04 AS AMENDED BY CH. 57-162, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Where a distributor of gasoline and like products also owns and operates one or more retail outlets of gasoline and like products and transfers from his wholesale plant to one or more of the retail plants gasoline and like products for sale at retail, is such transaction a wholesale or retail transaction?

2. Where the said retail plants have been leased to other persons and operated by them does such leasing make any difference in the answer to the 1st question?

3. Does the phrase "he must have made average monthly sales for the 12 months next preceding of not less than 40,000 gallons" relate to a period of time commencing on the effective date of the act, or may time prior thereto be considered?

Under §207.01, F. S., as amended in 1957, a "distributor" of gasoline and like products is defined as including any person, firm or corporation, including municipalities and political subdivisions, of this state, "that purchases or receives in this state gasoline in bulk quantities for resale to retail dealers, upon which the tax has not been paid." Section 208.04, F. S., as amended in 1957, provides that "distributors who hold valid distributor's licenses may purchase gasoline in bulk lots, without the tax imposed by this section being paid upon the first sale or transfer in this state as aforesaid, *for sale in wholesale quantities to retail dealers* As a condition precedent to a distributor purchasing and selling gasoline and like products under this subsection without the tax being paid upon the first sale or transaction in this state, *he must have made average monthly sales for the twelve months next preceding of not less than forty thousand gallons*; provided that sales made under provisions of §208.45, F. S., shall be included in arriving at such average monthly sales." (Emphasis supplied.)

"The business of selling at retail and the business of selling at wholesale are radically different in character, and the Legislature has the power to classify them separately" (Florida Sugar Dist. v. Wood, 135 Fla. 126, 184 So. 641, text 644). In this case it was further stated that "if a person or corporation engages in operating both a wholesale establishment and also a retail store" he must procure both a wholesaler's and a retailer's license. The legislature certainly has the right to apply different licenses or privilege taxes upon two such radically different businesses as the wholesale and the retail business. It, therefore, appears that a wholesale business and a retail business operated by the same person may be separate to the extent as to require separate occupational licenses. Wholesaling has been said to cover sales "to a retailer, a wholesaler, or an industrial consumer so long as the purpose of the customer in buying such goods is to resell them in one form or another or to use them for business needs as

supplies or equipment" (15 Ency. of Social Science 411).

In recent years it has been held that a business venture of a person, firm or corporation, when operated as a separate business, unconnected with other lines of business engaged in, may acquire a business situs separate from other business ventures of such person, firm or corporation, so as to permit the taxation of such business separate and apart from other properties of such person, firm or corporation (5 Words and Phrases 1046-1048; Annotations in 76 A. L. R. 806-829 and 143 A. L. R. 361-389). That is, a separate business operated by a person may acquire a commercial domicile or business situs for certain purposes separate and apart from the domicile or residence of its owner (*State v. Garford Trucking*, 4 N. J. 346, 72 A. 2d. 851, 16 A. L. R. 2d. 1407, text 1411). From these authorities it seems legally possible for a person, firm or corporation to operate a gasoline and like products distributing business and at the same time operate one or more gasoline and like products retail businesses in such a manner as to give each a separate business situs, although each of such businesses is owned and operated by the same person, firm or corporation. This would be especially possible where separate accounting records are kept, local management, although subject to a general overall management, is maintained, and separate accounts are kept for each such business. We see no legal prohibition against a person operating two or more businesses with separate business situses, one a wholesale business and the other a retail business, supplying the retail businesses with products for sale from the wholesale business.

Where the retail businesses are separate corporations, although the stock therein is owned or controlled by the same person, or where operated by others under lease from the owner, we see no reason why the wholesaler, although directly interested in the retail businesses as a stockholder or the lessor, could not sell gasoline and like products to such retail outlets without forfeiting his status of a wholesaler or distributor. In the light of the above observations the transaction therein mentioned would be a wholesale transaction and not a retail transaction where the retail businesses are maintained and operated as separate businesses having a separate business situs. Where the retail plants have been leased, as mentioned in the 2nd question, the idea of separate businesses would be more pronounced and the transaction contemplated would seem to be a wholesale transaction. Sales under §208.45, F. S., although having some features of a retail sale seem to be classified by the proviso at the end of the 2nd subsection as wholesale sales for the purposes of the said subsection.

Unless the 12-month period be construed as being the last preceding 12-month period, without regard to the time said Ch. 57-162 became a law and took effect, the operation of the provision of §208.04(2) F. S., as amended, will be delayed for a full year and until the one year has run we do not think that this was the intention and purpose of the legislature when the amendment was adopted. The phrase mentioned in the 3rd question should be considered without regard to the effective date of the said act and may have its beginning prior to the effective date of the act so long as the ending of the 12-month period is a time subsequent to the effective date of the act.

The above observations seem to answer the above questions as

positive as they may be here answered on the facts and circumstances before us.

057-140—June 1, 1957

TAXATION

TAX EXEMPTIONS—SWIMMING POOLS AND OTHER FACILITIES—APPORTIONMENT OF TAXES—§1, ART. IX AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where a swimming pool and recreation facilities, upon lands within a subdivision, are vested in a nonprofit corporation for the use and benefit of the owners of lots within the said subdivision, and is actually used by such owners for such purposes, are the said swimming pool and facilities, and the lands upon which located entitled to tax exemption?

2. If the above question is answered in the negative, may each lot in the said subdivision be increased in value so as to equalize between them the value of the said swimming pool and facilities, or a portion thereof?

It appears from the file handed us that the swimming pool and recreation facilities were constructed for and at the expense of the subdividers of the property and deeded to the nonprofit corporation "for the use and benefit of owners of lots in" the said subdivision, with a further provision that should it ever cease to be used for such purposes title would revert to the said subdividers. The general nature of the object of the said nonprofit corporation is the "mutual benefit of the property owners in the subdivision . . . for social and helpful activities in the operation of a society for the general welfare of the residents of" said subdivision. Membership in the corporation is limited to lot owners in the subdivision. It is entirely possible that the full cash value in the subdivision has been increased by reason of the existence of the swimming pool and recreation facilities.

All real and personal property in this state "excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes," is subject to ad valorem taxation (§1, Art. IX, and §16, Art. XVI, State Const.). Under these laws it is both the ownership and utilization of the property which determine tax exemption and not the ownership alone (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummas v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78). Ownership by a nonprofit corporation alone is not sufficient; there must also be utilization for one or more of the purposes mentioned in the above constitutional provisions. This being true, the question becomes primarily one of fact and not of law. The maintenance by a nonprofit corporation or club of a place where meals may be obtained and where members may gather for relaxation and social intercourse does not qualify the property for tax exemption (see *University Club v. Lanier*, *supra*). It has been stated that where the purpose of a fraternal organiza-

tion is social, rather than charitable or benevolent, tax exemption will be denied (84 C. J. S. 607, §295, note 39).

The maintenance and use of a swimming pool and recreation facilities by a select group less than a section of the general public would not usually constitute a use for some municipal, educational, literary, scientific, religious or charitable purpose within the purview of §1, Art. IX, and §16, Art. XVI, State Const., entitling the property to tax exemption. However, the question of exemption, being largely based upon use and not ownership, is largely one of the facts to be determined by the tax assessor. The answer to the 1st question depends upon facts and circumstances to be determined by the tax assessor.

Should the question as to particular property be answered by the tax assessor in the negative and the property be subject to taxation, then the 2nd question becomes material. Real estate taxes in Florida are levied against the property itself and not against the owner or owners thereof; although separate undivided interests are sometimes assessed separately. However, where property is owned by an existing current corporation such property may not be assessed according to the number of stockholder interests; the corporation being a legal entity there are no undivided interests therein. The taxes against one parcel of land may not be assessed and made a lien upon another parcel of land under existing statutes and laws. We are unable to conceive of any circumstances under present laws where property may be assessed as contemplated by the 2nd question; it is therefore answered in the negative.

57-141—June 3, 1957

COURTS

JUSTICE OF PEACE, LOCATION OF HEARINGS—§4, ART. XVI, STATE CONST.

To: J. Gregg O'Berry, Justice of the Peace, Lacoochee

QUESTION:

May a justice of the peace use different courtrooms in different areas of his district for the purpose of holding hearings?

I direct your attention to the Florida supreme court's decision in *Beville v. State*, 61 Fla. 8, 55 So. 854, wherein the court enumerated the provisions of §4, Art. XVI, State Const. and then said, "... it is usual and best to have a regular courthouse at county seats for the holding of courts, etc; ..." (Emphasis supplied.) I realize that the court in the *Beville* case concerned itself with a circuit court, but I direct your attention to §37.08, F. S., which says, "All the provisions of law which can be applied to courts of justices of peace, or to any proceeding therein, or to any officer thereof, shall be applicable thereto in all cases except when they are expressly or impliedly restricted to courts other than justice of the peace courts, ..." and §81.01, F. S., titled *Justice of the Peace Courts*, which says, "In such suits the rules of pleading and practice governing the circuit courts shall prevail and be enforced ..."

In view of the statutes providing that justices of the peace courts will be operated like other courts and abide by circuit court procedures, I see no reason why the *Beville* case is not applicable

to them. The obvious reason for the Beville decision and §4, Art. XVI, State Const., is that it avoids public confusion to have public hearings conducted at a known place.

In the light of the foregoing decision, it is my opinion that a justice of the peace should have only one place for hearings at a designated location within the particular justice of the peace district. The answer to the above question is in the negative.

057-142—June 3, 1957

LEGISLATURE

WHAT CONSTITUTES ACTUAL SESSION—IMPEACHMENT PROCEEDINGS IN SENATE—CHAPTER 57-2 (§18.091, F. S.), §§11.12 AND 11.13, F. S.

To: J. Edwin Larson, State Treasurer, Tallahassee

QUESTION:

When the state senate convenes on July 8, 1957, for impeachment proceedings as now provided, will such constitute "the Legislature of Florida . . . in actual session," as such words are used in Ch. 57-2, laws of Florida, 1957?

Chapter 57-2 provides in part that "during any period of time the *Legislature of Florida may be in actual session*, the State Treasurer is empowered to employ not more than two persons to assist in performing the services required of the State Treasurer in connection with legislative expense as provided in Section 11.12, Florida Statutes." (Emphasis supplied.)

The legislature of Florida consists of "a Senate and a House of Representatives." (§1, Art. III, State Const.) The convening and sitting of the senate for the length of time required for the purpose stated in the question will not technically constitute a session of the legislature. When so convened and sitting the senate will function as a court under power vested solely in it. (§29, Art. III, State Const.) In re Advisory Opinion to the Governor, 59 So. 782, dealt with the authority of the senate at the time the legislature had been called into special session to confirm appointments by the governor, in view of the wording of §8, Art. IV, State Const. The court stated that the confirmation by the senate of executive appointments to office could not be regarded as "legislative business" within the meaning of §8, Art. IV, and did not require the *cooperation of the house of representatives*. It is recognized that a respectable argument, premised upon the foregoing matters in this paragraph, could be made to the effect that since the legislature of Florida will not actually be in session when the senate meets for impeachment purposes, the provisions of Ch. 57-2 will not be applicable during such meeting of the senate. We consider such a construction would be so grudging as to obstruct obvious legislative intent in the adoption of said chapter.

The purpose of the chapter is to provide the necessary expenses to cover duties of the state treasurer as set out in §11.12, F. S., a portion of which is quoted: "The state treasurer is authorized to pay the salary, subsistence and mileage of the members of the legislature, together with such expenses of the legislature *as the same accrue* and the per diem of employees of the senate and house of representatives *as the same accrues . . .*" A portion of §11.13 (2), F. S., is quoted: "*During the time the legislature is in session*, each

legislator shall be paid for subsistence, per diem and mileage, etc." (Emphasis supplied). Other provisions of said §11.13 deal with expenses of interim committees, etc. It is hardly to be conceived that when the senate meets for impeachment purposes that it could be considered an "interim committee" of the legislature. Further, in connection with impeachment of officers, as provided by the constitution, certain functions are required of the house of representatives and of the senate. When the senate meets on July 8 for the stated purpose, it shall be performing its part of the duties cast upon the legislature by the constitution. It would be inconsistent to hold that the quoted provisions of §11.13(2) will be applicable to the members of the senate when they meet on July 8 and on the other hand to hold that Ch. 57-2 does not apply while the senate is so in session.

In view of the foregoing, in my opinion the question is answered as follows:

When the senate meets and sits in the impeachment proceedings referred to in the question, for the purposes of Ch. 57-2, the legislature of Florida will be in actual session, and the provisions of such chapter will be applicable.

057-143—June 3, 1957

LEGISLATURE

EXTENDED SESSION—LEGISLATION, APPLICATION OF §2, ART. III, STATE CONST.—§21, ART. III, STATE CONST.

To: *W. A. Shands, President of the Florida Senate, Tallahassee*

QUESTION:

Where the regular session of the legislature is extended under §2, Art. III, as amended, Fla. Const., does the requirement as to additional proposed legislation that consent be first obtained by a two-thirds vote of the members of the house into which such legislation is introduced, apply to such legislation received by the senate from the house of representatives?

Relevant wording of said §2, Art. III, is as follows: "During such extended session, no additional proposed legislation shall be introduced unless consent is first obtained by a two-thirds vote of the members of the House into which it is sought to be *introduced*." (Emphasis supplied.) Some years ago in another connection, the supreme court had occasion to deal with introduction of a bill in the legislature.

In the case of *Keene, et al. v. Lake County, et al.*, Fla., 125 So. 908, question was raised concerning evidence of intention to apply to the legislature for passage of a local act. At that time §21, Art. III, Fla. Const., provided in part that: "No local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the *introduction into the Legislature* of such bill, The evidence that such notice has been published shall be established *in the Legislature* before such bill shall be passed. . . ." (Emphasis supplied.) The local bill dealt with in such case was introduced in the house of representatives and immediately following the journal entry of its introduction was proof of publication of notice of in-

tention to apply for the bill's passage. No such evidence of intention to apply to the legislature appeared in the senate journal; and the validity of the act was challenged upon that ground. The court, among other things, stated:

The same legislative bill is "introduced" in only one House of the Legislature, though a duplicate may be introduced in the other House. When a bill is passed by one House, it is transmitted to the other House for its action thereon; but the bill passed by one House is not "introduced" in the other House when it is transmitted by the House by which the bill has been passed.

In the case of *State v. Brevard County, Fla.*, 126 So. 353, the court referred to its holding in the first mentioned case:

When a local bill is introduced in the House of Representatives and the journal entry of the "affidavit constituting proof of publication" does "immediately follow the journal entry showing the introduction of the bill," it is not necessary, under §21, art. III, Constitution, as amended in 1928, to make an entry of such affidavit in the journal of the Senate when the bill is transmitted to it by the House of Representatives after its passage by the House. *Keene v. Lake County*, 125 So. 908, decided Jan. 13, 1930.

In the light of the holding of the supreme court in the above two cases, the question is answered in the negative.

057-144—June 6, 1957

TAXATION

HOMESTEAD TAX EXEMPTION—EXTENT—MUNICIPAL HOMESTEADS, DWELLING AND BUSINESS HOUSE COMBINATIONS—§§1 AND 7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a person owns and operates a business or businesses in a building owned by him in an incorporated city or town, occupying a part of such building as his permanent home in this state, to what extent is such property entitled to homestead tax exemption?

The facts which give rise to this question involve business houses and dwelling house combinations, where an owner of a building consisting of one or more business or storerooms, in which he operates one or more businesses, or operates a business in one of the business rooms and leases others to other business men. There would under these facts be several possible combinations of use and leases which could give rise to the above question. In this state two types of homesteads are recognized, rural homesteads, and municipal homesteads; we are here concerned only with the municipal homesteads.

Section 7, Art. X, State Const., providing homestead exemptions from taxation, refers to §1, Art. X, of the said constitution, for a description and area of homesteads in this state. Under said §1, Art. X, the municipal homesteads are limited in area to not more than one-half acre of land, which may not "extend to more improvements or buildings than the residence and business house of the

owner." (Emphasis supplied.) In *Brodgon v. McBride*, Fla., 75 So. 2d 770, and *Lockhart v. Sasser*, 156 Fla. 339, 22 So. 2d 763, involved multiple unit apartment houses, each three stories in height, with the owner occupying an entire floor and renting the other two in each case; however, in these cases the part occupied by the occupant as a home could not be separated "by a perpendicular line without destroying or eliminating a part of that occupied by the owner." In each case the entire building was held to be the homestead of the owner and exempt from process. The inference is that had the part occupied by the owner as his home and the part rented been separable by a perpendicular line, that only a part of the apartment could have been claimed as homestead exempt. Where a homestead owner constructed, in addition to his dwelling house, an apartment upon his homestead premises for rental purposes such apartment was held not to be the owner's business house and the part of the premises upon which the apartment stood was held subject to execution. The test to determine whether an owner of a homestead has abandoned such homestead in part is whether or not there is located upon the exempt property more improvements than a dwelling and a business house (*Cowdery v. Herring*, 106 Fla. 567, 144 So. 348). An urban homestead is abandoned to the extent that a residence is constructed on it for the use of another (*Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588). In *Jordan v. Jordan*, 100 Fla. 1586, 132 So. 466, there were two apartment buildings on not more than one-half acre of land, one of which was used as the home of the owner and the other was rented to others. It was held that the homestead exemption from execution could not extend to both apartment buildings. The apartment building rented *was not* treated as the business house of the owner and was held subject to execution.

In *Smith v. Guckenheimer*, 42 Fla. 1, 27 So. 900, the owner of a two-story business building occupied the second story as his residence and dwelling place, used one of the storerooms on the first floor as his business house and rented other storerooms on the first floor to others in which they conducted separate businesses. Execution was levied against the said building on the ground that it did not constitute the dwelling house and business house of the owner. The court held that the store buildings rented by the owner and in which others operated businesses were not either the dwelling or the business house or houses of the owner. The court by perpendicular division divided the said building separating the exempt from the nonexempt properties and permitted sale of the nonexempt portion of the building under execution. The above cases demonstrate that the nonexempt portion of an owner's premises may be separated from the exempt portion, so as to permit the sale under execution of the nonexempt portion. These same rules seem applicable to homesteads under §7, Art. X, State Const.

Under §192.06, F. S., it was held in *State v. Doss*, 150 Fla. 491, 8 So. 2d 17, that when a property is owned by a charitable corporation or association and a part of it is used for the purposes of the corporation or association, and the balance is used for commercial or profit purposes, if severable that part used for the purposes of the corporation mentioned in §1, Art. X, State Const., may be exempted from taxation while that part used for profit may be taxed. This rule was followed in *Simpson v. Bohon*,

159 Fla. 280, 31 So. 2d 406, Text 207. Section 7, Art. X, State Const., contemplates the taxation of the portion of the homestead property not within the limited exemption of said section.

The above authorities lead to the conclusion that where a parcel of land is claimed by one as his homestead but consists of more than a dwelling house and a business house, that portion of the property used for other than a dwelling house and the business house of the owner may be assessed for taxes although the combined assessed value of the entire property is less than \$5,000. Under the circumstances mentioned in the Guckenheimer case the value of the storerooms rented by the owner (other than the portion used as living quarters and the owner's business house) would be subject to taxation. There appears to be no reason for the making of a perpendicular division of the property as above mentioned when no sale of the property is to be made, however, the undivided interest representing the taxable portion of the property may be assessed as was done in *State v. Doss and Simpson v. Bohon*, above.

057-145—June 6, 1957

LEGISLATURE

STATUS OF SENATE AND CHIEF JUSTICE OF STATE SUPREME COURT WHEN SITTING AS COURT OF IMPEACHMENT—§29, ART. III, §3, ART. I, STATE CONST.

To: *W. A. Shands, President of the Florida Senate, Tallahassee.*
QUESTION:

What is the status of the chief justice of the Florida supreme court and the members of the Florida senate, when trying impeachments under §29, Art. III, State Const.?

Under the state constitution (§29, Art. III) "The House of Representatives shall have the sole power of impeachment . . . and all impeachments shall be tried by the Senate. . . . The Chief Justice shall preside at all trials by impeachment . . . but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust or profit under the State. . . ." Under the federal constitution the house of representatives "shall have the sole power of impeachment" (clause 5, §2, Art. I) and "the Senate shall have the sole power to try all impeachments. . . . Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States" (§3, Art. I). The above mentioned provision in the present Florida constitution is substantially identical with a like provision appearing in the 1868 Florida constitution, which was dealt with by the supreme court of this state in an advisory opinion reported in 14 Fla. 289, et seq.

The above mentioned advisory opinion refers to the senate, when hearing impeachment proceedings, as a "Court of Impeachment," and makes the statement that, when sitting as a court of impeachment, the senate's jurisdiction "is too high and transcendent to be invaded" by another court—even the supreme court of the state. The opinion further refers to the senate and the supreme court as "two courts of high and transcendent jurisdiction." The

said advisory opinion in 14 Fla. 289, et seq., considered the effect of the senate receiving articles of impeachment and adjourning sine die without bringing the impeachment proceeding to trial, it being the contention of the one impeached that the adjournment without trial effected an acquittal, to which "proposition no member of the court accedes. So long as there is a senate there is a court. . . . Because senators may die or change, the senate does not cease to exist nor does its functions as a court cease. The court co-exists with the senate. . . . All cases of impeachment pending and undisposed of at the preceding session remain upon its calendar or docket until the senate sitting as a court enters an order finally disposing of each case. . . ." Mr. Justice Randal (14 Fla. text 315) refers to impeachment trials before the house of lords of England as the "trial of an offender, and the judgment is that of a court, the highest in the kingdom." It is clear from the said advisory opinion that the supreme court of Florida viewed the senate, when trying an impeachment proceeding, as a court and not as a legislative body. (Emphasis supplied.)

It is stated in 3 Willoughby on the Constitution, 2nd Ed. 1450, §932, that "the senate, when trying impeachments, sits not as a legislative but as a *judicial body*." In 15 Am. & Eng. Enc. of Law, 2nd Ed., 1064, it is stated that "the senate, when organized for the trial of an impeachment, is a court of exclusive, original and final jurisdiction." The same work, p. 1063, states that "in England the House of Lords alone have jurisdiction to try impeachments. The peers are judges of law as well as of fact." (Emphasis supplied.) The senators in the Florida legislature are the counterpart to the house of lords in England. In *State v. Chambern, Okla.*, 220 p. 890, 30 A. L. R. 144, the court referred to the Oklahoma senate, when sitting as a court of impeachment, as "sitting and acting as a high court of impeachment." In *Yancy v. Commonwealth, Ky.*, 122 S. W. 123, 25 L. R. A. (NS) 455, an impeachment proceeding was referred to as a judicial proceeding, the senate being the trial court. To the same effect see 2 Jones' Blackstone 2475, §296, and 1 Andrews American Law, 242, §201. We, therefore, conclude that the Florida senate, when sitting in the trial of an impeachment, is a court of last resort, with the members of the senate sitting as judges of law as well as judges of fact.

In connection with impeachment proceedings before the U. S. senate it has been customary for senators to file opinions concerning the trial, in the same manner as is done in courts of appeal and other courts. In the trial of Halstead L. Ritter, a U. S. district judge, opinions were filed by about ten of the senators. We find in these opinions references to the senate sitting as a court.

In 1897, the senate of this state, with the chief justice of the Florida supreme court presiding, adopted rules of procedure under which the chief justice was permitted to make a preliminary ruling on questions of evidence and incidental questions, which rulings were by the rules to become final "unless some member of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for decision." (Emphasis supplied.) This rule seems to have been patterned after a similar rule for the trial of impeachments in the U. S. senate. These rules also permitted the chief justice, as presiding officer, to submit rulings on such questions to the members of the senate in the first instance. These rules seem to treat the senate, when sitting as a court of impeachment, as a

multiple judge court. It appears from the said 1897 journals that the chief justice, when he appeared in the senate chamber to preside at the impeachment hearing, stated that he attended "for the purpose of joining with you in forming a court of impeachment for the trial of. . . ." In an effort to be of assistance we are attaching hereto for the information of the members of the senate reproduced pages from the above mentioned senate journal of 1897, setting forth the rules of procedure and practice then adopted.

"Before the senate proceeds to the consideration of the articles presented, the senators are sworn to do justice according to the constitution and laws. . . . After the organization of the senate as a court of impeachment, process is issued summoning the accused to appear upon a day named to answer to the articles of impeachment. On the return day of the process, the senate having convened as a court of impeachment, the accused is called to appear and answer. . . . In the conduct of the trial the practice is similar in nearly all respects to the practice in trial before ordinary courts of law . . ." (15 Am. & Eng. Enc. of Law, 2nd Ed. 1069-1070). (Emphasis supplied.)

In the light of the above mentioned authorities, as well as others not herein mentioned, we are of the opinion that when the senate of Florida is sitting as a court of impeachment the status of the senators is similar to that of associate justices of an appellate court, with the chief justice presiding. The status of the senators is more than that of a petit or trial jury, who are merely triers of the facts. The members of the senate, when trying an impeachment proceeding, are both triers of fact and of law. These observations seem to answer the above question.

Excerpts from Senate Journal 1897, pages 883-889

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON THE TRIAL OF IMPEACHMENTS.

1. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person, and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment agreeable to said notice.

2. When the managers of an impeachment shall be introduced at the bar of the Senate, and shall signify that they are ready to exhibit articles of impeachment against any person, the presiding officer of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the State of Florida articles of impeachment against _____"

;" after which the articles shall be exhibited, and then the presiding officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

3. Upon such articles being presented to the Senate, the Senate shall, at 11 o'clock of the day (Sunday excepted) following

such presentation, or sooner if so ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the presiding officer shall administer the oath hereinafter provided to the members of the Senate then present, and to the other members of the Senate as they shall appear, whose duty it shall be to take the same.

4. The Chief Justice of the State of Florida shall preside in all cases of impeachment, and notice shall be given to him by the presiding officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend, and the Chief Justice shall preside over the Senate during the consideration of said articles, and upon the trial of the person impeached therein.

5. The presiding officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

6. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules and regulations, which it may deem essential or conducive to the ends of justice. And the Sergeant-at-Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

7. The presiding officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the presiding officer upon the trial shall direct all the forms of proceeding while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. The presiding officer of the court may rule all questions of evidence and incidental questions, which ruling stand as the judgment of the court, unless some member of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for decision, or he may, at his option, in the first instance submit any such question to a vote of the members of the court.

8. Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall be issued to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writs shall be served by such officer or person as shall be named in the precept thereof, at least one day prior to the day fixed for such appearance, as shall be named in such precept, either by the delivery of an attested copy thereof to the person accused, or, if that cannot conveniently be done, by leaving such copy at last

known place of abode of such person, or at his usual place of business, in some conspicuous place therein; or if such service shall be, in judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered judgment may be entered thereon without further proceedings.

9. At 11 o'clock a.m. of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz:

"I, _____ do solemnly swear that the return made by me upon the process issued on the _____ day of _____, 1897, by the Senate of the State of Florida against _____ is truly made, and that I have performed such service as therein described; so help me God."

Which oath shall be entered at large on the records.

10. The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing, and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

11. At 11 o'clock a.m. of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of _____, in the Senate chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

12. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 11 o'clock a.m.; and when the hour for such sitting shall arrive, the presiding officer of the Senate shall so announce; and thereupon the presiding officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate, but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

13. The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

14. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

15. All motions made by the parties or their counsel shall

be addressed to the presiding officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

16. Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

17. If a Senator is called as a witness he shall be sworn and give his testimony standing in his place.

18. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the presiding officer.

19. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

20. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one-half hour on each side, unless the Senate shall, by order, extend the time.

21. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate, upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

22. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

23. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of rule 7, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question and for not more than five minutes on an interlocutory question, and for not more than ten minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present.

24. Witnesses shall be sworn in the following form, namely:
 "You, _____, do swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the State of Florida and _____ shall be the truth, the whole truth, and nothing but the truth; so help you God."

Which oath shall be administered by the Secretary or any other duly authorized person.

Form of subpoena to be issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel:

The State of Florida, to _____, greeting:

You and each of you are hereby commanded to appear before

the Senate of the State of Florida on the _____ day of _____, 1897, at the Senate chamber, in the city of Tallahassee, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached _____

Fail not.

Witness _____ and presiding officer of the Senate, at the City of Tallahassee, Florida, this _____ day of _____, in the year of our Lord, 1897.

Form of direction for the service of said subpoena:

The State of Florida, to _____ greeting:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Tallahassee, Florida, this _____ day of _____, in the year of our Lord, 1897.

Secretary of the Senate.

Form of oath to be administered to the members of the Senate sitting in the trials of impeachments:

I solemnly swear (or affirm, as the case may be), that in all things appertaining to the trial of the impeachment of _____, now pending, I will do impartial justice according to the Constitution and Laws of the State of Florida; so help me God.

Form of summons to be issued and served upon the person impeached:

The State of Florida to _____ greeting:

Whereas, The House of Representatives of the State of Florida did, on the _____ day of _____, 1897, exhibit to the Senate articles of impeachment against you, the said _____, in the words following:

(Here insert the articles.)

And demand that you, the said _____ should be put up to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials and judgments might be thereupon had as are agreeable to law and justice.

You, the said _____ are therefore hereby summoned to be and appear before the Senate of the State of Florida, at their chamber, in the city of Tallahassee, Florida, on the _____ day of _____, 1897, at 11 o'clock a. m., then and there to answer to the said articles of impeachment, and then and there to abide by, obey and perform such orders, directions and judgments as the Senate of the State of Florida shall make in the premises according to the Constitution and laws of the State of Florida.

Hereof you are not to fail.

Witness _____ and presiding officer of the said Senate at the city of Tallahassee, Florida, this _____ day of _____, in the year of our Lord, 1897.

Form of precept to be endorsed on said writ of summons:

The State of Florida, to _____ greeting:

You are hereby commanded to deliver to and leave with _____, if conveniently to be found, or, if not, to leave at his usual place of abode, or his usual place of business, in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this

precept; and in whichsoever way you perform the service let it be done at least one day before the appearance day mentioned in said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon endorsed, on or before the appearance day mentioned in the said writ of summons.

Witness _____ and presiding officer of the Senate, at the city of Tallahassee, Florida, this _____ day of _____, in the year of our Lord 1897.

All process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court.

25. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming and consideration.

26. The Senate may, at its pleasure, adjourn the hearing of the case and hear same in the hall of the House of Representatives, by a majority vote.

Mr. Hartridge moved the adoption of the above rules of procedure and practice in the Senate, when sitting on the trial of impeachment.

Mr. Broome moved the consideration of the motion to adopt be postponed until to-morrow;

Which was agreed to.

057-147—June 6, 1957

TAXATION

EXEMPTION—PROPERTY HELD FOR FUTURE USE AS CHURCH SITE BY NONPROFIT CHARITABLE CORPORATION—§192.06, F. S.; §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a nonprofit charitable corporation owns and holds vacant real estate for future use as church sites and for religious conference grounds and for other philanthropic purposes, are such lands entitled to tax exemption?

It appears from the file furnished us with the request for opinion that "the land for which exemption has been requested is vacant and supposedly being held for future use as sites for churches, parsonages, conference grounds or other religious or charitable purposes." The charter provides in part that "this corporation shall be operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children and animals." It seems evident from the file that the property in question is being held for religious, scientific, municipal, educational, literary or charitable purposes. This seems to satisfy one element of the requirements of §1, Art. IX, and §16, Art. XVI, State Const.; that is, being held for one or more of the above mentioned purposes. Under these constitutional provisions, and §192.06, F. S., *ownership and utilization* of the property, not ownership alone, are the criteria for determining its exemption from taxation. Ownership alone is not sufficient; there

must also be utilization for one or more of the purposes mentioned in the state constitution (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78).

The above cited cases were based primarily upon §1, Art. IX, State Const., and §192.06, F. S., which seem to be more limited in their scope as to religious institutions than is §16, Art. XVI, State Const. (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 567, 195 So. 607.) We gather from the file handed us with the request for opinion that there are no church buildings, burial grounds or parsonages upon the lands in question sufficient to bring the claimed exemption within said §1, Art. IX, State Const. and §192.06, F. S. (See *Lummus v. Miami Beach Congregational Church*, supra.) In the *Lummus* case "the property has been used only for meetings of clubs, committees and social gatherings of the church and a Boy Scout troop sponsored by it." The deed, in the *Lummus* case, contained the limitation "that this property shall be used for church purposes only," and the court remarked "there is naught to show that it is used for any other than the appropriate activities of the incorporated church." If we correctly remember the record in the *Lummus* case, it also shows that the lands were used as a parking area for persons attending church in the appellee church.

The record before us fails to show the complete factual circumstances surrounding each lot or parcel of lands in question and its actual use for religious or other purposes mentioned in §16, Art. XVI, State Const. This being true, we cannot pass upon the question of the use of the property. However, we feel that the above observations furnish a formula from which, by the application of all the facts, the tax assessor may determine the question. If the property is used exclusively for one or more of the purposes mentioned in §16, Art. XVI, State Const., it is entitled to tax exemption.

057-148—June 6, 1957

TAXATION

TAXATION OF INTEREST OF RESIDENT OF STATE IN FIRM
OR PARTNERSHIP WITH OUT-OF-STATE PRINCIPAL
OFFICE—§§47.15, 199.02, 199.07, 200.08, 620.18
AND 675.15, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a member of an unincorporated firm, or a partner in a general or limited partnership, having its principal office or place of business in another state, is a resident of this state, is his interest in the firm or partnership, or in the firm or partnership property, subject to taxation in this state?

The above question is intended to extend to personal representatives of deceased members or partners who were citizens or residents of this state at the time of their death. It seems that the particular interest in question was that of a deceased resident

or citizen of this state who, at the time of his death, was both a general and a limited partner in a limited partnership.

The general rule seems to be that "the property of a copartnership should be assessed to it in its firm name. Real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly, giving the names of all" (84 C. J. S. 774, §404; see also 61 C. J. 637, note 52). Cooley states that "property of a partnership is generally with much propriety required to be taxed at the place where the partnership business is carried on; and it should be assessed in the firm name" (3 Cooley on Taxation, 3rd Ed. 1236-7, §1105). Under Florida statutes persons, *firms* and corporations are required to make tax returns of personal property owned by them or under their control, management or custody (§§199.07 and 200.08, F. S.) thereby indicating the possibility that such property should be assessed in the firm name instead of and to each individual partner as his interest may appear. Where negotiable paper of a partnership has been dishonored notice thereof need only be served on one of the partners (§675.15, F. S.). Provision is made in §47.15, F. S., for the bringing of a suit in law or at equity against the partnership as a separate entity and the service of process on a single partner, which binds the partnership property but not the property of each individual partner. This section tends to treat a partnership as a separate entity for some purposes.

"The common law rule that a partnership cannot hold legal title to real property does not apply to personal property. The personal property of a partnership is owned not by the partners individually, but by the partnership" (40 Am. Jur. 202, §107; see also 68 C. J. S. 502, §70 and 506, §72). The above question primarily concerns personal property and not real property. "It is well settled that the joint effects of a partnership belong to the firm, and not to the partners, and that a partner has no individual property in any specific assets of the firm Instead, the interest of each partner in the partnership property is his share in the surplus after the partnership debts are paid . . ." (40 Am. Jur. 209, §114). "A limited partner's interest in the partnership is personal property" (§620.18, F. S., a uniform law). The purchaser at an execution sale, pursuant to an execution against a partner and not the partnership, takes no title to specific property but becomes a tenant in common with the remaining partners. He merely acquires the interest of the partnership. There are some authorities holding that his right against the partnership property is the same as the partner and that partnership debts are prior to his interest on liquidation (68 C. J. S. 739, §240). The rule seems to be that partners do not, as individuals, own the firm property, but that it is held by, and belongs to, the partnership as such, and the partners do not, as individuals, have any specific interest in any particular asset or particular part of the assets, nor can a partner assign or transfer an undivided share in any specific articles belonging to the partnership (68 C. J. S. 525, §85). This appears to be the rule in Florida, New York and other states.

Many cases recognize that businesses operated under modern methods may acquire a business situs different from that of their owners for some purposes (Annotations in 76 A. L. R.

806-829 and 143 A. L. R. 361-389), including purposes of taxation. This rule has been applied to partnership businesses (Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N.W. 548, L. R. A. 1915C 922, Ann. Cas. 1912B 756). It follows that partnership personal property should usually be assessed in the name of the partnership and not to the partners individually or in the nature of trustees. This disposes of the question of the assessment of partnership property and its usual situs for taxation, and brings us to the question of the taxation of the interest of the partner in the partnership.

The interest of a partner in partnership property has been said to be a mere chose in action (Re. Dumarest's Estate, 262 N. Y. S. 450; State v. Elsbury, 63 Nev. 463, 175 P. 2d 430). "It is property, or, more precisely, personal property, regardless of the character of the property owned by the partnership, and is susceptible of being seized under legal process, as well as being sold, assigned or mortgaged." (68 C. J. S. 526, section 85). Under §199.02, F. S., "*shares of incorporated or unincorporated companies*" are classified as class "B" intangible personal property. (Emphasis supplied.) Partnership interests were held intangible personal property in Wooten v. Oklahoma Tax Commission, 185 Okla. 259, 91 P. 2d 259; in Blodgett v. Silberman, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749, the court said that "the interest of a partner was the right to receive a sum of money equal to his share of the net value of the partnership after a settlement, and this right to his share is a debt owing to him, a chose in action, and an intangible."

Answering the above question the partner's equitable interest in the partnership property as such is not subject to taxation but his interest in the partnership, as distinguished from the partnership property, is an intangible subject to taxation. The interest of a personal representative in his decedent's partnership interests would likewise be subject to taxation. We have considered no question of tax exemption.

057-149—June 6, 1957

TAXATION

EXEMPTION STATUS OF CHAMBERS OF COMMERCE, BUILDERS, EXCHANGE, ETC.—§192.06, F. S.; §1, ART. IX, AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are chambers of commerce, builders' exchanges, and similar organizations, organized and existing in this state entitled to exemption from taxation?

In this state all real and personal property is subject to ad valorem taxation except such as may be held and used exclusively for religious, scientific, municipal, educational or charitable purposes (§1, Art. IX, §16, Art. XVI, Fla. Const.; §192.06 F. S.). Under these constitutional and statutory provisions *ownership and utilization of the property* are the criteria for determining the right to exemption from taxation (Riverside Academy v. Watkins, 155 Fla. 283, 19 So. 2d 870; State v. Doss, 146 Fla. 752, 2 So. 2d 303; State v. St. Johns, 143 Fla. 544, 197 So. 131; Lummus v. Florida Adirondack School, 123 Fla. 810, 168 So. 232; Univ. Club v.

Lanier, 119 Fla. 146, 161 So. 78). Ownership alone is not sufficient; there must also be utilization for one or more of the purposes mentioned in the Florida constitution. This being true, the question becomes primarily one of fact and not of law.

The fact that a corporation may have been organized as a nonprofit corporation, pursuant to the corporate statutes of this state, and even though its charter may declare that it has been organized for religious, scientific, municipal, educational or charitable purposes, does not give it tax exemption; there must also be an exclusive use for one or more of such purposes. There is little law upon the question of tax exemption for chambers of commerce. However, it is stated in 84 C. J. S. 602, §293, that "although a Chamber of Commerce is not a corporation organized for profit, its primary purpose is promotion of business, and accordingly it has been denied exemption as a charitable, educational or scientific institution" (see also annotation in 152 A. L. R. 184 and 185). There is no provision in Florida Statutes expressly exempting chambers of commerce from ad valorem taxation, as there is in some states (see annotation in 152 A. L. R. 181, et seq). The question appears to have been before the courts but few times. In *Boston Chamber of Commerce v. Assessors*, 315 Mass. 712, 54 N. E. 2d 199, 152 A. L. R. 174, *Memphis Chamber of Commerce v. City of Memphis*, 144 Tenn. 291, 232 S. W. 73, *Chamber of Commerce v. Mills*, 188 Misc. 592, 65 N. Y. S. 2d 231 (affirmed 71 N. Y. S. 2d 896, 73 N. Y. S. 2d 639) chambers of commerce appear to have been held not *charitable, educational or scientific* institutions for purposes of tax exemption. In this connection see also *Peoples National Bank v. Greenville*, 174 S. C. 256, 177 S. E. 369, involving municipal property leased to a chamber of commerce, which was held subject to taxation.

We are advised that the builders exchange in question is a clearing house for information relative to construction in a particular county, which serves not only members of the organization but also the general public, giving information relative to the financing and construction of homes and other improvements. It was organized and exists as a nonprofit corporation under the statutes of Florida. The corporation is designed to cultivate business relations and the meeting of competitors of the building business and other purposes.

For property to be entitled to tax exemption in this state, it must be held and used exclusively for *religious, scientific, municipal, educational or charitable purposes* or be under some specific statutory exemption, and we find no provision specifically exempting chambers of commerce or builders' exchanges. This being true, the question becomes one of fact and not of law. Should the tax assessor find from all the evidence, facts and circumstances before him that the property of chambers of commerce and builders' exchanges are being held and used exclusively for religious, scientific, municipal, educational or charitable purposes, then they should be exempted from taxation; otherwise their property is subject to taxation.

This answers the above question as well as the same may be answered from the facts and circumstances before us.

057-151—June 7, 1957

COURTS—CRIMINAL PROCEDURE

PAYMENT OF WITNESS FEES AND MILEAGE TO STATE
AND COUNTY EMPLOYEES—§902.19(4), F. S.

To: *J. Louis Carter, Clerk, Criminal and County Courts, West
Palm Beach*

QUESTION:

Does the clerk of the criminal and county courts, Palm Beach county, have authority to pay to sheriffs, deputy sheriffs, constables, deputy constables, highway patrolmen or other persons employed or paid by the state, who are subpoenaed to testify in the criminal court of record in Palm Beach county, witness fees and mileage when such persons are employed in counties other than Palm Beach county?

Section 902.19(4), F. S., provides:

No sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or other person employed or paid by the state or any county thereof as a law enforcement officer shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence.

In your question you only ask whether the persons enumerated are entitled to witness fees and mileage when such persons are subpoenaed to testify in the criminal court of record in Palm Beach county, when *employed* in counties other than Palm Beach. Employment in another county will not necessarily entitle the witness to witness fees or mileage. In a given case, a witness among the classes enumerated in said §902.19(4), F. S., may be employed in a county other than Palm Beach and yet reside in Palm Beach county. In such a case, such witness would not be entitled to witness fees or mileage. It is my opinion that any persons falling within the classes enumerated in §902.19(4), F. S., are entitled to witness fees and mileage when any of those persons are summoned to testify in the criminal court of record in Palm Beach county, unless such persons hold office, are employed, or have their residence in Palm Beach county. If such persons either hold office, are employed, or have their residence in Palm Beach county, they would not be entitled to witness fees and mileage. However, as to certain practical aspects of the subject, I suggest that you consider opinion 051-344, rendered by this office on Oct. 2, 1951.

Subject to the foregoing observations, your question is answered in the affirmative.

057-152—June 7, 1957

LABOR

PRIVATE EMPLOYMENT AGENCIES PROCURING LABOR FOR LOCAL AND OUT-OF-STATE EMPLOYMENT—

§§205.13, 205.39, 449.02(5) AND 449.07, AND CH. 449, F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTIONS:

1. Is §205.39, F. S., applicable to agents licensed under Ch. 449, F. S., that is, does Ch. 449, F. S., supersede the effect of §205.39, F. S., insofar as the latter might be applicable to the agencies specifically licensed under Ch. 449, F. S.?

2. Would §205.39, F. S., be applicable to an agency duly licensed under Ch. 449, F. S., if such agency was engaged exclusively in soliciting and training domestic employees for referral to positions outside the limits of this state?

3. Would the provisions of §205.39, F. S., apply to an agency licensed under Ch. 449, F. S., engaged in doing a general intrastate employment service business, but which occasionally solicits workers for referral to jobs beyond the limits of this state?

AS TO QUESTION 1:

There is no apparent conflict or overlap between §205.39 and Ch. 449, F. S. The wording contained in §449.02(5), F. S., says that no person, firm or corporation shall carry on an employment agency *in this state* until a license is procured. Section 449.07, F. S., implies that all but contract or railroad laborers will be employed within the same city where the agency is located. On the other hand, §205.39(2), F. S., says "The term 'emigrant agent,' as contemplated by this section, shall be construed to mean any person, firm or corporation engaged in hiring laborers, or soliciting emigrants in this state, to be employed *beyond the limits of this state*; . . ." (Emphasis supplied.) Inasmuch as Ch. 449, F. S., appears to apply only to intrastate labor and §205.39, F. S., definitely applies to interstate labor there is no apparent overlap of the two laws.

The title to Ch. 449, F. S., (Ch. 24080, 1947) indicates that it is a regulatory act and §11 thereof says, "The Commission shall . . . use said moneys solely for administering this Act." There is no indication that moneys collected under this act are in lieu of occupational license fees. Chapter 205, F. S., is a revenue act as opposed to a regulatory act. Your attention is directed to §205.13, F. S., which says, "Fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be *in addition to and not in lieu of* any occupational license tax required by this chapter or other law unless otherwise expressly provided by law." (Emphasis supplied.) Since one of these acts is regulatory and the other revenue there is no financial conflict between the two laws.

In view of the above analysis, §205.39, F. S., could be applied to agents licensed under Ch. 449, F. S., if such agents were

engaged in the business of hiring emigrant labor of this state for employment in other states. The answer to question 1 then is in the affirmative.

AS TO QUESTION 2:

In answer to question 2, I refer you to the answer to the above question. Using the theory outlined above and applying §205.39, F. S., an agency engaged exclusively in soliciting employees for referral to positions outside the limits of this state, should be taxed as an emigrant agent. The answer to question 2 is also in the affirmative.

AS TO QUESTION 3:

In answering question 3, I again refer you to the answer to question 1. It is my opinion that if an agency referred any workers to positions beyond the limits of the state, whether it be one worker or one hundred, §205.39, F. S., would be applicable and the agent should be so taxed. The answer to this question is in the affirmative.

I am enclosing opinion 048-43, a previous opinion of this office, touching on this subject.

057-153—June 7, 1957

EDUCATION

SCHOOLS, FINANCE AND TAXATION—ANNUAL APPORTIONMENT FOR EACH COUNTY—AMOUNT TO BE INCLUDED FOR TRANSPORTATION—§§236.07(4) AND 229.23, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Does the 115% provision in §236.07 (4), F. S., require that a county school board purchase school bus equipment at a price which does not exceed the price established under §229.23, F. S.?

2. Should the answer to the above question be in the affirmative, there is a further question. If a county does spend an amount which exceeds this 115% provision in the year 1955-56 would this restriction now apply during the year 1956-57 since it cannot be clearly established until the end of the budget year that expenditures have exceeded the statutory amount?

Section 236.07 (4), F. S., provides in part, "... no county shall be permitted to use foundation program funds to purchase buses, chassis or other transportation equipment at prices which exceed those found by the state department of education to be the lowest which can be obtained, as prescribed in §229.23. Any county which spends or proposes to spend for transportation, exclusive of the amount for purchase of buses, a sum which exceeds one hundred fifteen per cent of the amount included in the minimum foundation program for transportation for that county, shall submit all proposed expenditures for salaries of bus drivers, contract prices for transportation and prices for purchase of buses and chassis to the state board for review in accordance with standards prescribed by it until such county reduces its annual expenditures for transportation exclusive of

the amount spent for purchase of buses and chassis to not more than one hundred fifteen per cent of the amount included in the minimum foundation program for transportation, or provides the state board with evidence satisfactory to it that the cost cannot be further reduced."

It seems clear that the above quoted section prohibits a county from paying more for school buses than the established state price if the purchase is made from state foundation funds. If the purchase is made from local school funds this prohibition would not apply, even though the county's transportation expenditures exceeded 115% of the amount included in the minimum foundation program for transportation. I am advised that little if any state foundation money is now used for the purchase of school buses and that they are bought almost exclusively from local county funds.

Your 1st question as it is presented is therefore answered in the negative and the 2nd question therefore requires no answer unless the purchase was made from state funds. In that event, your 2nd question is answered in the affirmative.

It should be pointed out, however, that §229.23, F. S., contains the following proviso: "provided, however, that no county board shall make any such purchases which exceed three hundred dollars at any higher prices except during emergencies as prescribed by the state board. . . ."

The above quoted proviso refers to the duty of the state department of education to assist counties to pool their bids for purchase of buses and equipment and to advise the county boards of the lowest prices at which buses are available.

This section does prohibit counties from paying more for buses than the established lowest price (on purchases of more than \$300 except during an emergency).

Counties whose local bids obtained for the purchases of buses are higher than the pool price established by the state department of education for comparable equipment must therefore under this act reject the local bids and purchase through the pool purchase plan provided in §229.23, F. S.

057-154—June 7, 1957

PERSONAL PROPERTY

DISPOSITION OF UNCLAIMED PROPERTY—§§705.01-705.03,
715.01, 790.07, 790.08 AND 901.19(3), F. S.

To: *Al Cahill, Sheriff, Duval County, Jacksonville*

QUESTIONS:

1. What disposition may be made of "found" or abandoned bicycles and automobiles held in the custody of the sheriff?

2. Where miscellaneous items of evidence in disposed of cases are in the custody of the sheriff, is there any statutory proceeding by which such may be sold?

AS TO QUESTION 1:

Your attention is directed to the provisions of Ch. 705, F. S., dealing with wrecked, derelict and abandoned property. Section 705.01, F. S., provides that when "any wrecked derelict goods,

abandoned motor vehicle or other personal property . . ." is found in the county, the county judge shall order the sheriff to take charge and sell it at public outcry. The procedure is set out in §§705.02 and 705.03, F. S., the last designated section providing for the disposition of the proceeds of the sale. Therefore, where abandoned automobiles and "found" bicycles come into the possession and custody of the sheriff, the sheriff may follow the provisions noted above. Section 715.01, F. S., does not cover your problem.

AS TO QUESTION 2:

Items which have been introduced in evidence become a part of the legal proceedings and are in the custody of the law. Section 790.07, F. S., provides that where a person lawfully arrested ". . . while committing a criminal offense or a breach or disturbance of the public peace, is armed with or has on his person any slung shot, metallic knuckles, billies, fire arms or other dangerous weapon . . ." he is subject to criminal penalty. Section 790.08, F. S., requires the arresting officer to take such weapon into possession and outlines a procedure whereby the same shall be forfeited to the state.

Section 901.19 (3), F. S., deals with apparatus used for gambling purposes, requiring that the arresting officer seize it and after its use as evidence, the officer publicly destroy the same under court order. I do not find any other statutory provisions for the disposition of evidence which may be introduced in the trial of criminal or civil cases. You may wish to discuss this matter with the judges of the various courts concerned to determine whether or not they have any suggestions for the disposition of the various items.

057-155—June 6, 1957

LEGISLATURE

RECESSES IN EXTENDED SESSION UNDER §2, ART. III, STATE CONST.

To: *W. A. Shands, President, State Senate, Tallahassee*

QUESTION:

What constitutes "Recesses in such extended session . . ." as said words are used in §2, Art. III, Fla. Const.?

The entire sentence is, "Recesses in such extended session shall be taken only by joint action of both houses."

The specific situation from which the question derived is explained by the following example: One of the legislative houses in this extended session, in pursuance of action duly taken, adjourns this afternoon to convene at a stated time day after tomorrow morning. The suggestion has been made that since such an adjournment would not be in pursuance of "joint action of both houses" it would constitute a violation of the quoted sentence from §2, Art. III. We do not consider that the suggestion is tenable. Such a construction could dictate that both houses convene and adjourn each day at the same time.

Attention is directed to §13, Art. III, Fla. Const.: "The doors of each House shall be kept open during its session except the Senate while sitting in Executive Session; and neither shall,

without the consent of the other, *adjourn for more than three days* or to any other town than that in which they may be holding their session." (Emphasis supplied.) "Recess," within the meaning of §2, Art. III, and "adjourn," as used in §13, Art. III, are synonymous in meaning; that is to say, they both refer to a temporary suspension of business, a postponement of business to a named day *Beath v. Roberts*, Ia., 137 N. W. 1006; *Byrd v. Byrd*, Miss., 8 So. 2d 510; *Ex parte Mirandi*, Cal., 14 P. 888). Also see definition of "recess" and of "adjourn" (other than in the sense of a sine die adjournment) in *Black's Law Dictionary*, 4th Ed.

It is the general rule, in construing constitutions, that the construction is favored which gives effect to every clause and every part thereof; that a construction of the constitution which nullifies or renders inoperative any of its provisions is to be rejected; and that constitutional provisions are to be interpreted with reference to their relation to each other, unless a different intent is clearly manifest (*State v. Bryan*, Fla., 39 So. 929; *State v. Butler*, Fla., 69 So. 771; *Wheeler v. Meggs*, Fla., 78 So. 685). Further, an amendment becomes a part of the constitution and must be construed in *pari materia* with all parts of the constitution having a bearing upon the same subject (*Sylvester v. Tindal*, Fla., 18 So. 2d 892).

In view of the above, in my opinion the word "Recesses" in the question is to be construed in the light of the word "adjourn" as used in said §13, Art. III; that is to say, recesses or adjournments "for more than three days."

057-156—June 10, 1957

COURTS

DISMISSAL OF CASES UPON PARTIAL PAYMENT OF COSTS IN JUSTICE OF PEACE COURTS—§14, DECLARATION OF RIGHTS, STATE CONST.

To: *E. P. DeFriest, Jr., Justice of the Peace, Fort Pierce*

QUESTION:

May a justice of the peace dismiss a case upon partial payment of court costs?

I find no statute, case law or authority under §14, declaration of rights, State Const., which would permit a justice of the peace to dismiss a case on partial payment of the costs. There being no statutory authority or legal basis for such procedure, it is my opinion your question must be answered in the negative.

057-157—June 10, 1957

SHERIFFS

INVESTIGATION REPORTS AND FILES, AVAILABILITY TO PUBLIC AND PRESS—§119.01, F. S.

To: *John A. Madigan, Jr., Florida Sheriffs Ass'n, Tallahassee*

QUESTIONS:

1. Are the sheriffs' investigative and "M.O." files, used in connection with the investigation of crimes and the apprehension of criminals, public records and therefore open to inspection by the press and public?

2. Are the complaint records of the sheriff's office open to public inspection? (For example, Mr. Jones reports his home broken into and his watch and wallet missing; reports a possible suspect based on very intangible yet reasonable evidence; quiet but thorough investigation is indicated. All of such data is recorded on a "complaint report.") Must such report be made available to the press and public on request, even though in the judgment and discretion of the sheriff, the release of such data may well handicap the investigation?

Section 119.01, F. S., provides as follows:

All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.

This office on Sept. 1, 1953, in opinion 053-223, held relative to the books, records, maps and documents of the state racing commission and annual racing applications filed by the various race tracks and frontons that they were open to examination, not only to public officials, but to a private citizen showing an interest in such records, but that records of an investigative nature which contained personal and privileged information and similar data come under a different heading and are not necessarily public documents even though they may be in the custody of a public agency.

In opinion 050-510, released Oct. 31, 1950, we held that the personal file folder of an individual taking the merit system examination, which includes confidential inquiries, would not be open to the examination of the public and falls within the exception to the above statute, although certain information in the personal file folder, such as employment history and general qualifications, could be made available to the public if desired, but confidential information and investigative reports should not be divulged.

This office held in opinion 041-126 that reports filed by physicians with health officers, as required by a number of statutes, concerning the existence of certain diseases are not public records within the above named section.

The supreme court of Florida in the petition of Kilgore, 65 So. 2d, p. 30, held that a request by the governor for an advisory opinion by the supreme court could be withdrawn at any time, and during the period it is within the breast of the supreme court it is not subject to public inspection or inquiry and therefore a request for an advisory opinion does not become part of the public files of the supreme court except, unless and until the reply thereto, which contains the request, is delivered to the governor, at which time it is filed with the clerk of the supreme court and thereafter is open to the press and public for inspection as are other opinions to the court when so filed.

Following this reasoning a request made of a sheriff to make an official investigation by any public official relative to the suspected violation of the law is a confidential matter, and all of the notes and records of the sheriff's office as to suspects, leads, confidential information, tips, etc., are not public records, and if the sheriff and his office force are going to do a competent

job with respect to law enforcement, these records should not be divulged to anyone not actively engaged in the investigation of the case.

We know as a matter of common knowledge and good judgment that when a complaint is made to the sheriff's office with reference to a suspected violation of the law, in the process of investigation, the names of many suspects are contained in the sheriff's investigative report. Much confidential information which at any particular time might not be proven may be given to the sheriff by persons interested in seeing the law properly enforced, which information in the final analysis may prove to be untrue, or in fact may prove to relate to another separate and distinct violation of the law, and therefore it would not only be foolish practice, but contrary to public policy to divulge such information to the public or to the press. Even after an investigation has been completed the sheriff's report to the prosecuting attorney may be made in a confidential manner containing many facts and circumstances that should not be made public until the trial of the case. The reason for such secrecy is apparent. In the first place the state may be placed at an unfair advantage in divulging all of its information and the manner in which it was secured prior to the trial of the case and persons on whom the state might depend as witnesses would be placed in a category which would subject them to pressure and harassment from the defendant or defendants, as the case may be.

Such matters as a record of arrests, the names of persons who have been arrested and copies of informations and indictments which have been filed against individuals are of course public records, and the ordinary business records of the office, F.B.I. records in the sheriff's office and criminal records of the sheriff's office are public records and are available to the public and press if desired.

I trust that this answers your questions.

057-158—June 10, 1957

EDUCATION

INSTRUCTION UNITS—AVERAGE DAILY ATTENDANCE IN
PUBLIC SCHOOLS—DETENTION HOMES—§§230.03,
230.23(13), 236.04, 236.61 AND 416.04, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. May a county board of public instruction legally earn instruction units based on average daily attendance of children in detention homes?

2. May a county board of public instruction legally have exceptional child units approved if the units are to be used wholly for the instruction of children in detention homes?

AS TO QUESTION 1:

On Nov. 19, 1956, I wrote to the Honorable Mr. J. B. Hopkins, representative of Escambia county, in reply to his inquiry as to the responsibility of the county board of commissioners to maintain detention homes for children. In this letter I advised Mr. Hopkins that

§416.04, F. S., requires the county commissioners to construct the buildings to be used for a detention home.

The language of §416.04 would also appear to place the responsibility for operation and maintenance of detention homes on the board of county commissioners rather than on the county school board.

Apparently the legislature in enacting §416.04 considered detention homes to be custodial institutions as distinguished from the public school system.

Section 230.03, F. S., provides, in part, ". . . county school officials, however, shall have the authority to provide additional educational opportunities, as desired, which are authorized but not required by law."

Section 230.23 (13), F. S., provides for cooperation between the "county school board and other federal, state, county and municipal agencies in enforcement of laws . . . pertaining to . . . physical restoration of children . . . health of pupils . . . child welfare and other matters relating to education."

Section 236.04 provides the basis for determination of number of instruction units which is of course the basis for allocation of state school funds. This determination is made from the *average daily attendance in the public schools*.

It would appear that children committed to a detention home operated by the county commissioners would not be enrolled in the public schools and could not be counted in determining the average daily attendance in the public schools.

Your 1st question is therefore answered in the negative.

AS TO QUESTION 2:

Section 236.04 provides the procedure for determining the number of instruction units for exceptional children. This provision does not require the children to actually be in attendance at a public school. It provides, in part, "(a) For each group of ten or more exceptional children to be taught by a properly qualified full time teacher *as a special class, or taught individually as home-bound or hospitalized children unable to attend school* for the major portion of the year. . . ."

In my opinion the above quoted law would permit the county school board by cooperation with the county board of commissioners to extend teaching services to children who have been committed to detention homes and are therefore unable to attend a public school.

Section 236.61 defines exceptional children, in part, as ". . . any other educable child or youth who because of a physical, emotional or mental condition has been certified by a competent specialist qualified under regulations of the state board . . . as unsuitable for enrollment in a regular class of the public schools without the provision of special educational facilities or services. Instruction units for exceptional children shall be computed as prescribed in §236.04 when the following requirements for participation have been met"

Assuming that children placed in county detention homes fall within the above definition of exceptional children and the county board otherwise complies with the provisions of §236.61, F. S., your 2nd question is answered in the affirmative.

057-159—June 11, 1957

EDUCATION

REVENUE CERTIFICATES—ISSUANCE—SIGNATURES OF
OFFICERS OF BOARD OF CONTROL AND CLERK
OF COURT—§§75.11 AND 243.03, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

When revenue certificates are issued by the board of control, may facsimile signatures on the certificates be used by the chairman of the board of control, the secretary of the board of control, the secretary of the state board of education and the clerk of the court which validated the certificates?

Chapter 243, F. S., provides for the issuance of revenue certificates by the board of control.

Section 243.03 provides, in part, "Revenue certificates issued under the provisions of this law shall be authorized by resolution of the board. Said revenue certificates . . . may be executed in such manner . . . as such resolution or other resolutions may provide."

Chapter 75, F. S., provides the procedure for validation of bonds and revenue certificates. Section 75.11 provides, "Bonds or certificates when issued under the provisions of this chapter, shall have stamped or written thereon, by the proper officers of such county, municipality or district issuing the same, the following: 'Validated and confirmed by decree of the circuit court (specifying the date when such decree was rendered and the court in which it was rendered)', which shall be signed by the clerk of the circuit court in which the decree was rendered, which entry shall be original evidence of said decree in any court of this state." (Emphasis supplied.)

In my opinion, revenue certificates issued by the board of control may bear the facsimile signatures of the chairman of the board of control and the secretary of the state board of education if such facsimile signatures are specified by the authorizing resolutions of the board of control and the state board of education as provided in §243.03. I believe, however, that although the statutes do not specifically require the actual signature of the secretary of the board of control, such signature should be present on the bond or certificate in accord with general market practice and procedure as original evidence of the issuing authorities' approval of the obligation.

It appears also that the clerk of the court which validates the certificates must sign the certificates of validation to be shown on the bonds or revenue certificates as required by §75.11, F. S.

057-160—April 25, 1957

LEGISLATION

APPROPRIATION BILLS—CONSTRUCTION OF §30, ART. III, STATE CONST.

To: *James S. Moody, Chairman, House Appropriations Committee,
Tallahassee*

QUESTION:

Does §9 of proposed 1957 appropriations bill violate provisions of §30, Art. III, State Const.?

Section 9 mentioned by you appears to be as follows:

The amounts approved by the legislature in the funds and appropriations for any department or branch of the state government created by the Constitution and/or statutes of the state shall be expended only for the purpose for which appropriated, except that day labor may be construed as coming within expenses; provided, however, that expenses may be used for operating capital outlay by and with the approval of the state budget commission. The Chairman of the Senate Appropriations Committee and the Chairman of the House Appropriations Committee shall furnish a joint report to the budget commission setting forth the spending philosophy of the legislature for the ensuing biennial period for which the funds and appropriations are provided herein or otherwise provided by law. The report shall be filed with the budget commission on the same day the legislature passes the general appropriations act. It is the intent of the legislature that this report shall be the basis on which the allotment and release of funds shall be made by the Budget Commission. The report shall contain, among other things, the following: (1) The amount approved for salaries to maintain the number of current filled positions as reflected in the legislative budget of each department, (2) the amounts approved for salaries to provide for the number of current unfilled positions as approved by the legislature, (3) the amount approved for salary increases in the first year and the second year of the biennium for current filled and unfilled positions, (4) the number of new positions and the amount for new positions approved in the first year and the second year of the biennium, (5) the amounts approved for salary increases for new positions in the first year and the second year of the biennium, and (6) the amounts approved for other salaries and the purposes for which approved. No salary shall exceed the amount budgeted in the legislative budget for each individual position, and no monies shall be used for salary increases except the amount specifically approved by the legislature for salary increases; provided, however, the Budget Commission may change, by unanimous affirmative vote of all members, the salary item in an individual position in such cases determined by the Budget Commission to be emergency and exceptional hardship cases. It is the intent of the legislature that salary funds that accrue from turnover of personnel and other reasons shall not be used for

salary increases or additional new positions above the amounts and numbers approved by the legislature, except as provided above for exceptional hardship cases.

Section 30, Art. III, State Const., provides that "laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions on no other subject." This constitutional provision is identical with §30 Art. IV Const. of 1868 under which the court considered §3 of the general appropriations act of 1872, which provided that all comptroller's warrants and treasurer's certificates issued for services performed after Jan. 1, 1872, should be receivable for all state dues, with certain exceptions. The court, in advisory opinion, 14 Fla. 283, held that §3 was violative of the state constitutional provision of 1868. In another advisory opinion, 14 Fla. 286, the court said that the 1868 constitutional provision "renders the junction of a law making appropriations for salaries and other current expenses, with any other subject obnoxious to the charge of a violation of its provisions." In *State v. Florida State Racing Com.*, Fla., 70 So. 2d 375, text 380, referring to §30, Art. III, State Const., remarked that it is "repeatedly pointed out that the purpose of this provision is to prohibit the General Appropriations Bill for state expenses being laden with items that tend to hamper the conduct of the government." The supreme court of Oregon, in *Evanhoff v. State Industrial Accident Com.*, 78 Or. 503, 154 P. 106, text 111, stated that constitutional provisions of this kind are designed to prevent matters foreign to the general purpose of appropriations bills being attached to them as riders. The purpose of this constitutional amendment appears to be to prevent the inclusion of general legislation in and as a part of an appropriation bill.

In *State v. Southern Land and Lumber Co.*, 43 Fla. 374, 36 So. 999, and in *Amos v. Mosely*, 74 Fla. 555, 77 So. 619, text 624, a distinction is made between an act making an appropriation for the purpose of enforcing legislation contained in such act and as an incident thereto and biennial appropriations act.

From these cases it appears that §30, Art. III, State Const., applies only to general appropriations acts and has no application to acts making appropriation merely as an incident thereto.

The bill in question, being a general appropriations one is subject to the requirement of §30, Art. III, State Const.

Section 14 of the general appropriations bill of 1943 contained a section numbered 14 as follows:

All disbursements made under the appropriations provided for in this Act together with all other disbursements made by the Comptroller's Warrant, countersigned by the Governor, shall be classified according to personal services, travel expenses, contractual services, supplies, equipment, capital outlays and such other classification as may be prescribed by law and such detailed classification shall be printed in the Comptroller's annual reports and shall be adopted by the State Budget Commission as the classification of accounts in the preparation of the budget of the State of Florida.

This section was vetoed by the governor but later became involved in litigation on the theory that it was not such an item in the general appropriations bill as might be vetoed and should, there-

fore, be enforced notwithstanding the veto. However, the court held that the said section was violative of §30, Art. III, State Const., and void and unenforceable. The court stated that "our conclusion is that under the said Section 30, Article III, the inclusion of Section 14 in the General Appropriation Act of 1943 was not authorized and that said section was unconstitutional and void (*Lee v. Dowda*, 155 Fla. 68, 19 So. 2d 570, text 573). In *Caldwell v. Board of Regents*, 54 Ariz. 404, 96 P. 2d 401, a general appropriation act contained the following proviso: "In no case shall both the husband and wife be included, at the same time, on the payrolls mentioned in this act." This provision was held violative of a constitutional provision substantially the same as §30, Art. III, Florida Const.

In *State v. Smith*, 335 Mo. 1069, 75 S. W. 2d 828, an appropriation had been made appropriating the sum of \$3000 from the general revenue fund to a fund for the use of a state board. This appropriation had the effect of amending a section of the Missouri statutes relating to said state board. In this connection the court remarked: "There is no doubt but that the amendment of a general statute such as Section 13525 and the mere appropriation of money are two entirely different and separate subjects," and held the provision invalid.

In *People v. Russell*, 311 Ill. 96, 142 N. E. 537, text 542, the court quoted from a former case as follows:

The language employed in this section is plain and unmistakable, and was clearly intended to prevent the making of appropriations for the pay of salaries of officers of the state government in any bill which should contain a provision on any other subject than that of appropriations for the pay of members and officers of the General Assembly and for salaries of officers of the state government. . . . Under this section of the Constitution it is incumbent upon the General Assembly to make the appropriations for the pay of its members and officers and for the salaries of the officers of the state government by a separate bill or bills which shall contain no provision on any other subject than that of appropriations for such members and officers.

In this connection see also 81 C. J. S. 1220, §164; 59 C. J. 255, §393; 42 Am. Jur. 750, §47. From the above and foregoing authorities substantial questions are raised as to the validity of said §9 of the proposed 1957 general appropriations act. The said §9 may also be subject to the objections made by the court in *People v. Tremaine*, 252 N. Y. 27, 168 N. E. 817.

The principal question raised in *People v. Tremaine*, *supra*, was whether the legislature could constitutionally attach to the appropriations the condition requiring approval of the two chairmen, the governor having insisted upon the unconstitutionality of such a condition; and it was decided that the designation of such chairmen to approve the segregations amounted to the making of civil appointments by the legislature, in violation of a con-

stitutional provision that no member of that body should receive any civil appointment. In reply to the contention that the duties so attempted to be conferred on these chairmen were reasonably incidental to the performance of their duties as members of the legislature, the court said that the new duties were administrative, and that the legislature attempted to make two of its members ex officio its executive agents to carry out the law. And the court further pointed out the law—that, if the appointments should be regarded as legislative in character rather than administrative, they were void as unauthorized delegations of legislative power over appropriations. A specially concurring judge who disagreed with the holding that the constitutional provision against appointment to a civil office was violated expressed the view that the requirement of approval by the two chairmen was equally illegal as an attempt to clothe members of the legislature with administrative functions after the appropriation had been made.

The above authorities raise a serious question as to the validity of proposed §9; also the case of *People v. Tremaine* raises a serious question to the right of the legislature to delegate to the chairman of the senate and house appropriation committees the powers mentioned in said section. In our opinion we feel that proposed §9 would be invalid.

057-162—June 13, 1957

TAXATION

TAX EXEMPTION STATUS OF ELKS CLUBS—§192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a lodge of the B. P. O. E. of the U. S. purchased a parcel of land to be used as a recreational area as well as a site for its lodge building, is such property exempt from taxation under §192.06, F. S., and the state constitution?

The discussion of taxes and tax exemptions in our opinion of June 6, 1957 (057-149), is also applicable to property held by the B. P. O. E. in this state. In this connection see also *Simpson v. Bohon*, 159 Florida 280, 31 So. 2d 406, which directly involved the question of the right of an Elks club to tax exemption of its club house. Under these authorities it appears that ownership and utilization of the property, not ownership alone, is the criterion for determining the right to exemption from taxation. The tax assessor should ascertain the use and utilization of the property, or any divisible part thereof, and whether or not such use is an exclusive religious, scientific, municipal, educational or charitable use, or two or more of such uses, and if his findings are in the affirmative then the property is exempt from taxation to the extent of such exclusive use. The question is primarily one of fact, to be determined by the tax assessor, and not exclusively one of law.

057-165—June 17, 1957

**AUTO TRANSPORTATION COMPANIES
INSPECTORS OF RAILROAD AND PUBLIC UTILITIES
COMMISSION MAKING ARRESTS UNDER CH. 323—
INELIGIBILITY FOR APPOINTMENT AS DEPUTY
SHERIFF—§15, ART. XVI, STATE CONST.**

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

While an inspector is employed by the railroad and public utilities commission under §323.21, F. S., may he also be appointed deputy sheriff and the sheriff be entitled to the fees provided by §30.23, F. S., for services performed by such inspector where he: (1) Arrests for a violation of law pertaining to automobile transportation companies? (2) Arrests for violation of traffic laws? and (3) Arrests for any other violations of law?

Section 323.21, F. S., after providing that the railroad and public utilities commission may employ inspectors and other employees, in part provides:

... All inspectors employed by the commission are vested with the powers of deputy sheriffs in all counties of the state and authorized to stop and check any motor vehicles on the highways for violation of the provisions of this chapter or the laws touching such motor vehicle operation, and to make arrests for any such violation in the same manner as such arrest could be made by the deputy sheriffs of the several counties of the state.

We find upon inquiry that the legal department of the Florida railroad and public utilities commission is of the opinion that when the inspector is performing the duties of a deputy sheriff as provided by the statute the inspector is exercising sovereign power of the state and, therefore, is an officer within the contemplation of the Florida constitution. Hence, by reason of the provisions of §15, Art. XVI, State Const., the inspector would be prohibited from accepting a commission as deputy sheriff. We see no reason to disagree with the construction which has been placed upon the statute prohibiting the inspector from accepting the appointment as a deputy sheriff. This, therefore, makes it unnecessary to answer the questions.

057-166—June 17, 1957

**INSURANCE
STRUCTURAL CONDITION WARRANTY CONTRACT OF
INSURANCE**

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Does the form of structural condition warranty proposed to be issued by a Florida corporation, described below, constitute in any of its provisions a policy of insurance?

The warranty certifies that inspection has been made of a described building and that in the opinion of the corporation the same is structurally sound and that the electrical system and

plumbing therein are in good condition; and then provides that if the certification is in error, the company will protect the holder of the warranty for cost of repair or replacement of the structural components, the plumbing and/or electrical system when the necessity for such repair and replacement is a direct and sole result of inherent defect during the term of the warranty, subject to stated conditions.

It is provided that "inherent defect" for the purpose of the warranty shall mean faulty original construction of the building proper, particularly in the structural components and certain parts of the plumbing and electrical system, as provided; that faulty original construction can be determined either by "(a) visible defects in workmanship or materials which limit the capacity of the building to fulfill its functional purpose . . . ; or (b) leaking roofs, the transmission of rain, snow or sleet through the exterior masonry walls, settlement or subsidence of the building proper and rupture of the plumbing lines, electrical cable and conduit, all of which shall be accepted as evidence of the initial existence of defective construction and installation."

There follows definitions of "Structural components (exterior)," "Structural components (interior)," and "Roofs." Under "Limitations" there are the provisions that the warranty affords protection "to the extent of reasonable costs of repairs and replacements of structural components and certain plumbing and parts of the electrical system made necessary by inherent defect, not to exceed \$———;" that the warranty "should not be construed to be an insurance contract, since it provides protection against existing conditions only." Under "Exclusions" appears the provision that repairs or replacement made necessary either solely or partially by fortuitous circumstances such as, but not limited to . . . "Fire, lightning, earthquake, volcanic eruption, tidal wave, flood and rising waters, explosion, malicious mischief and windstorm of gale force or stronger," are not covered by the warranty.

It has been said that a warranty promises indemnity against defects in an article sold, while insurance indemnifies against loss or damage from perils outside and unrelated to defects in the article itself. 44 C.J.S. 473-4, §1; 12 Appleman Insurance Law and Practice, Vol. 5, §7001; *State v. Western Auto Supply Co.*, Ohio, 16 N.E. 2d 256, 119 A.L.R. 1236; *State v. Standard Oil Co.*, Ohio, 35 N.E. 2d 437; *Lamson Cons. Serv. Co. v. Conyngham*, 32 N.Y.S. 129. For distinction between "guaranty" and "warranty" see 38 C.J.S. 1134. "Insurance" may be said to be an agreement whereby for a premium or other compensation one party (insurer) undertakes to compensate the other (insured) for loss on a specified subject when caused by specified perils. *State v. DeWitt C. Jones Co.*, Fla., 147 So. 230; Annotations in 63 A.L.R. 712, et seq., 100 A.L.R. 1449 and 119 A.L.R. 1241; 44 C.J.S. 471, §1.

In view of the foregoing, in my opinion the above described "Structural Condition Warranty" does not constitute a contract of insurance; hence, the question is answered in the negative.

057-167—June 18, 1957

REVENUE CERTIFICATES

ISSUANCE BY COUNTIES, DISTRICTS OR MUNICIPALITIES—
PREREQUISITES—§6, ART. IX, STATE CONST.—
CH. 57-1846, LAWS OF FLORIDA.

To: *Henry S. Bartholomew, State Representative, Sarasota*
QUESTION:

Where promissory notes issued by an airport authority in this state are secured by a mortgage on airport property, real and personal, are such promissory notes bonds within the purview of §6, Art. IX, State Const.?

Under said §6, Art. IX, State Const., the state is prohibited from issuing bonds except "for the purpose of repelling invasion or suppressing insurrection," and counties, districts and municipalities are prohibited from issuing bonds unless they "have been approved by a majority of votes cast in an election in which a majority of the freeholders who are qualified electors residing in such counties, districts or municipalities shall participate" The said airport authority appears to be an agency of Sarasota and Manatee counties. We find no provision in the original act (Ch. 31263, 1955) or the amendment (senate bill 1231, 1957 session) providing for the assessment and levy of a tax. However, the said senate bill does provide for the issuance of promissory notes by the authority, and to "secure such promissory notes, the Airport Authority is authorized to mortgage the project, projects, facility or facilities . . . together with real estate of the Authority, provided that no more than forty acres of land, in the aggregate, of the authority shall be subject to such mortgage or mortgages at any one time" (See senate bill.) The said promissory notes are declared to "be binding obligations of said Airport Authority"

The provisions in the statutes setting up the Broward county port authority, which were substantially the same as the above mentioned provisions in said senate bill, and the attempt of the authority to mortgage its property to secure revenue certificates was held violative of said §6, Art. IX, State Const. in *Broward County Port Authority v. State*, 129 Fla. 73, 175 So. 796. In *Brash v. State Tuberculosis Board*, 124 Fla. 167, 167 So. 827, it was held that the state tuberculosis board could not execute a mortgage on one of its hospital buildings, although acquired without state funds, without violating the provisions of §6, Art. IX, State Const., prohibiting state bonds.

In the light of the above mentioned decisions of the Florida supreme court we feel that the above question must be answered in the affirmative. This being true we doubt that the mortgages on airport property, mentioned in said senate bill 1231, of the 1957 regular session of the legislature, may be made by the authority without the same being first submitted to the election required by said §6, Art. IX, State Const.

057-168—June 18, 1957

LEGISLATION

CENSUS APPLICABLE TO §166.03, F. S.—CH. 57-126, LAWS OF FLORIDA (§11.031, F. S.), §5, ART. VII, STATE CONST.

To: Norman R. Lyons, City Attorney, Miami

QUESTION:

Is the census taken in compliance with Ch. 30685, special laws of Florida, 1955, applicable to §166.03, F. S., which says, "... the population in each instance to be determined by the federal or state census, as the case may be, next preceding the election of said board"?

Enclosed herewith you will find a copy of attorney general's opinion 055-212 which appears almost directly in point, since the questions raised in the former as well as the present case stem from almost identical wording of different statutes. The phraseology which raised the question decided by the cited opinion is "according to the *next preceding state or federal census*," and the phrase now under consideration is "... to be determined by the *federal or state census*, as the case may be, *next preceding* the election. . . ." (Emphasis supplied.)

In summary, to grant certain privileges to Dade or other counties which have been fortunate enough to have had a census since the last decennial federal census would be to grant special privileges to a select group of counties and make a special law out of a general one which most probably was not the intent of the legislature.

Your attention is further directed to Ch. 57-126 of the 1957 acts, which was obviously passed to clear up questions such as the one which confronts us now. This act is to be interpreted in connection with §5, Art. XII, State Const., which says, "State census.—The Legislature shall no longer be required to provide for an enumeration of the inhabitants of the State. The last preceding decennial Federal census beginning with the Federal census of 1950 shall also be the State census and shall control in all population Acts and constitutional apportionments, unless otherwise ordered by the Legislature." According to Ch. 57-126(1) we must look to the purpose of the last census. Chapter 30685(6), special laws of Florida, defines the purpose of the 1955 census as "... the official state census of said county for the purpose of entitling the Eleventh Judicial Circuit to the benefits of the provisions of Section 45 Article V of the Constitution of the State of Florida and of Section 26.16 of Florida Statutes 1953." Therefore, the 1955 census does not apply to §166.03, F. S. According to §2 of the new Act "... no existing population or apportionment act shall be affected by a special census," which means to me that §166.03, F. S., would not be affected by the 1955 census.

In order to be consistent with previous opinions of this office and in an effort to lend uniformity to the general laws of Florida, it is my opinion that the answer to the above question is in the negative.

057-169—June 18, 1957

LEGISLATION

EFFECTIVE DATE OF LAWS ENACTED AT 1957 SESSION—
§§2, 18, ART. III, STATE CONST.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

What is the effective date of laws, without specific provisions on the subject, adopted at the 1957 session of the legislature?

Section 18, Art. III, Fla. Const., provides that no law shall take effect "until sixty days from the final adjournment of the session of the Legislature at which it may have been enacted, unless otherwise specifically provided in such law."

Section 2, Art. III, Fla. Const., provides in part that, "The regular sixty day biennial session of the Legislature may, by a three-fifths vote of the membership of both houses, be extended not exceeding a total of thirty days which need not be consecutive."

The regular 1957 session of the legislature was extended by house concurrent resolution 2078 "beginning on Saturday, June 1st through Saturday, June 8th, to twelve o'clock midnight." The 1957 session adjourned at 1 P. M., June 8, 1957. Among other things our supreme court stated in its Advisory Opinion to the Governor, filed June 6, 1957, "Instead the Legislature extended its session for a stipulated period and established a definite terminal date and hour." (Emphasis supplied.) The aforesaid adjournment of the 1957 legislature in extended session was the "final adjournment" of said regular 1957 session as such words are used in §18, Art. III; and there was no "final adjournment" thereof prior thereto.

Where time is to be computed "from" a specific date, the rule is to exclude the first day, and include the last. *Simmons v. Hanne*, Fla., 39 So. 77; 86 C.J.S. 851, §13(3); and generally to like effect see *Croissant v. DeSoto Improvement Co.*, Fla. 101 So. 37; *Silvernail v. American Fire & Casualty Co.*, Fla., 80 So. 2d 707.

It is noted that said session of the legislature adjourned at 1 P. M., June 8. In *New York Life Ins. Co. v. Bullock*, Fla., 26 F. 2d 666, the court considered a policy provision to the effect that the same should become "incontestable after two years from its date of issue;" and the court stated that in construing a statute or contract where computation of time is to be made "from a specific date, and not from an occurrence of an event on that day, then the first day must be excluded." The rule stated in 88 C.J.S. 900, §506, is to the effect that in computing time it is the general rule that fractions of days are not to be considered, but that "there are numerous exceptions to this rule." In the *Croissant* case there was involved the provision in §28 Art. III, Fla. Const., as it then existed, concerning time after adjournment within which the governor might object to a bill involving the words "within ten days after the adjournment, etc." That particular session of the legislature adjourned sine die at 12 o'clock noon on a given date; and in computing the time the court made no mention of fractions of days. We have dealt with the effective dates of acts where no mention was made as to when they became effective. One opinion involved an act adopted by the legislature which adjourned June 3, 1949, and fixed

the effective date at Aug. 2, 1949 (1949-1950 B. R. 627); another opinion fixed the effective date at Aug. 4, 1953, where the legislative session ended June 5, 1953 (1953-1954 B. R., 144). In neither of these opinions was mention made of possible fractions of days.

In view of the foregoing, in my opinion the question is answered as follows:

The "final adjournment" of the regular 1957 session of the legislature occurred on June 8, 1957. A law enacted at said session, without provision as to the time it becomes effective, will take effect on Aug. 7, 1957.

057-171—June 19, 1957

INSURANCE

PROPERTY OF PLAN AFFORDING COVERAGE TO REPLACE OPTICAL LENSES—§627.72(3), F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Is the insurance plan described below authorized under our insurance laws?

The plan of insurance is described: A "master policy" is issued to an optician for a small fixed premium plus additional amounts based upon the number of prescriptions filled; when glasses are sold to a customer the optician executes a "Record of Entry Certificate," stating that it is issued under the master policy, setting forth that the same covers replacement of lenses damaged from any cause for a period of three years or until a new prescription is issued, whichever is first to occur, and the purchaser of the glasses is charged a "three year service fee" in amount equal to 10% of the retail cost of the lenses, subject to a \$3 minimum; and the policy provides that the insurance company will pay the insured "in such amounts as may be named in each application for 'Record of Entry Certificates,' and agrees to pay the loss, if any, to said insured and/or to the person or persons, firm or firms, corporation or corporations, where repairs are made as their interest may appear."

A reading of the several copies of instruments which accompanied the request for opinion leaves us a bit uncertain concerning the relationship of the persons involved and the nature of the coverage.

If the policy is to be construed as indemnifying the insured optician for commitments made by him with his patients, the insured optician is placed in the position of making insurance agreements with his patients. On the other hand, if this is a master policy, the issuance by the insured optician of record of entry certificates places the latter in the position of functioning as an insurance agent; and even though such certificates were countersigned by a resident agent of the insured, the practical aspects of the insured optician making known to a purchaser of glasses the coverage involved and the charging of the "service fee" would constitute activities of an insurance agent. (See §627.72(3), F. S.)

In an effort to be helpful, we have inquired into the question of whether a warranty could be issued by the insured optician

there in excess of those fees, penalties, charges or taxes Florida imposes on such companies operating here. For a general discussion of the nature of these laws see *Fidelity & Deposit Co. v. Brown*, Vt., 104 Atl. 234; *Equitable Fire & Marine Ins. Co. v. Commonwealth*, Va., 80 S. E. 2d 549; *Occidental Life Ins. Co. v. Holmes*, Mont., 80 P. 2d 383; *Employers Casualty Co. v. Hobbs*, Kas., 89 P. 2d 923; 29 Am. Jur. 75-77, §§39 and 40; 44 C. J. S. 560, §§76; 84 C.J.S. 378, §195; Annotation 91 A.L.R. 798-804.

Heretofore, in certain of the opinions and letters addressed to you, we have assumed the position to the effect that the amount in excess of 2% assessed by Florida industrial commission on carriers of workmen's compensation coverage is not an item to be considered in connection with application of the provisions of §626.061. The effect of your request and the letter of firemen's fund insurance company which accompanied it is for our reconsideration of that position.

Each year Florida industrial commission is required to estimate in advance amounts necessary for administration of Ch. 440, our workmen's compensation law, such estimate being based upon expense of administration for the preceding fiscal year; and such expenses so estimated are prorated among all insurance companies writing workmen's compensation coverage. It is provided that, "The gross premiums collected by the companies and the amount of premiums a self-insurer would have to pay if insured are the basis for computing the amount to be assessed;" and the amount "may be assessed as a specific amount or as a percentage of gross premiums payable as the commission may direct, provided, however, such amount so assessed shall not exceed four per cent of such gross premiums." (§440.51(1)). The commission provides by regulation "for collection of the amount assessed"; if such amount is not paid within 30 days of the date notice of the commission concerning it is served, a prescribed "civil penalty" is added to the amount; and if "any carrier fails to pay the amounts assessed against him . . . within sixty days" the state treasurer may suspend or revoke authorization of the carrier to insure compensation, in accordance with prescribed procedure (§440.51(1) and (2)). "Any amount so assessed against and paid by an insurance carrier shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments or deposits for workmen's compensation insurance on contracts or policies of said insurance carrier." (§440.51(5)). (Emphasis supplied.)

The credit "against the amount of any other tax" mentioned in above subsection (5) refers to the 2% gross premium tax levied in pursuance of §205.43, F. S. Hence, it is that the significance in the question is found in and involves the amount in excess of 2% which may be assessed in any year by the industrial commission under §440.51.

As to the nature of the imposition under §440.51, reasonably it falls in the same category as the premium receipts tax prescribed by Ch. 29860, 1955. That act imposes an annual tax on premiums from fire and lightning coverage of not in excess of 3/8 of 1%, but subject to reduction by the fire marshal, as prescribed, to defray expenses of the office of the state fire marshal. It is quite reasonable that such impositions constitute regulatory or excise taxes, but in any event the better position would appear to be that with respect to the imposition here discussed, it is a "fee, penalty, charge or tax"

within the meaning of §626.061.

No necessity here exists to labor respectable aspects of the question which induced us to assume the original position in relation to the question mentioned above.

In view of the foregoing, in my opinion the question is answered as follows:

The assessment imposed by Florida industrial commission under §440.51 in excess of 2% is a tax within the meaning of §626.061, F. S. Hence, as to any foreign insurer in applying the provisions of §626.061, such assessment under §440.51 in excess of the general 2% premium receipts tax under §205.43, F. S., shall be considered and dealt with as a "tax" within the meaning of the former section. It is to be understood, of course, that in any event the amount of tax imposed by Florida must be paid; further, that the conclusions herein are subject to the proviso concluding subsection (1) and the provisions of subsection (2) of §626.061. This opinion supersedes the previous conclusion adopted by this office relating to this question.

057-174—June 20, 1957

COUNTY FINANCE

SECTIONS 30.47-30.54, F. S. (CH. 57-368); SHERIFFS; COUNTY TRAFFIC OFFICERS; BUDGETS, ETC., CH. 146, F. S., CH. 28944, 1953

To: *State Auditing Department, Tallahassee*

QUESTIONS:

1. In the light of Ch. 57-368, 1957, should funds for the maintenance of county traffic officers, operating under Ch. 146, F. S., be budgeted and paid by the sheriff, or should they continue to be budgeted and paid by the board of county commissioners?

2. In the light of said Ch. 57-368, should the expenses of county traffic officers, operating under Ch. 28944, 1953, be budgeted and paid by the sheriff or should they continue to be budgeted and paid as provided in said Ch. 28944?

Said Ch. 57-368, 1957, places the office of sheriff, in the counties within the purview of said chapter, on a salary instead of a fee basis. The salaries, including the sheriff's salary, and expenses of the office, are paid by the sheriff from budgeted funds provided by the county commissioners in accordance with the provisions of said chapter. Under this chapter the sheriff is required to prepare a tentative official budget for his office and submit the same to the board of county commissioners, as the budgeting authority, or to the county budget commission in counties having such budget commission. The act contemplates that this budget be sufficient for the proper carrying out of the powers, duties and operations of the sheriff's office during the ensuing fiscal year. This budget is required to provide for the sheriff's salary, salaries of deputies and assistants, expenses other than salaries, equipment, investigations, etc. No specific mention is made under said Ch. 57-368 of county traffic officers, their duties, compensation, equipment, etc., and whether they exist under Ch. 146, F. S., or other laws, such as Ch. 28944, 1953, setting up

there in excess of those fees, penalties, charges or taxes Florida imposes on such companies operating here. For a general discussion of the nature of these laws see *Fidelity & Deposit Co. v. Brown*, Vt., 104 Atl. 234; *Equitable Fire & Marine Ins. Co. v. Commonwealth*, Va., 80 S. E. 2d 549; *Occidental Life Ins. Co. v. Holmes*, Mont., 80 P. 2d 383; *Employers Casualty Co. v. Hobbs*, Kas., 89 P. 2d 923; 29 Am. Jur. 75-77, §§39 and 40; 44 C. J. S. 560, §§76; 84 C.J.S. 378, §195; Annotation 91 A.L.R. 798-804.

Heretofore, in certain of the opinions and letters addressed to you, we have assumed the position to the effect that the amount in excess of 2% assessed by Florida industrial commission on carriers of workmen's compensation coverage is not an item to be considered in connection with application of the provisions of §626.061. The effect of your request and the letter of firemen's fund insurance company which accompanied it is for our reconsideration of that position.

Each year Florida industrial commission is required to estimate in advance amounts necessary for administration of Ch. 440, our workmen's compensation law, such estimate being based upon expense of administration for the preceding fiscal year; and such expenses so estimated are prorated among all insurance companies writing workmen's compensation coverage. It is provided that, "The gross premiums collected by the companies and the amount of premiums a self-insurer would have to pay if insured are the basis for computing the amount to be assessed;" and the amount "may be assessed as a specific amount or as a percentage of gross premiums payable as the commission may direct, provided, however, such amount so assessed shall not exceed four per cent of such gross premiums." (§440.51(1)). The commission provides by regulation "for collection of the amount assessed"; if such amount is not paid within 30 days of the date notice of the commission concerning it is served, a prescribed "civil penalty" is added to the amount; and if "any carrier fails to pay the amounts assessed against him . . . within sixty days" the state treasurer may suspend or revoke authorization of the carrier to insure compensation, in accordance with prescribed procedure (§440.51(1) and (2)). "Any amount so assessed against and paid by an insurance carrier shall be allowed as a deduction against the amount of any other tax levied by the state upon the premiums, assessments or deposits for workmen's compensation insurance on contracts or policies of said insurance carrier." (§440.51(5)). (Emphasis supplied.)

The credit "against the amount of any other tax" mentioned in above subsection (5) refers to the 2% gross premium tax levied in pursuance of §205.43, F. S. Hence, it is that the significance in the question is found in and involves the amount *in excess of 2%* which may be assessed in any year by the industrial commission under §440.51.

As to the *nature* of the imposition under §440.51, reasonably it falls in the same category as the premium receipts tax prescribed by Ch. 29860, 1955. That act imposes an annual tax on premiums from fire and lightning coverage of not in excess of 3/8 of 1%, but subject to reduction by the fire marshal, as prescribed, to defray expenses of the office of the state fire marshal. It is quite reasonable that such impositions constitute regulatory or excise taxes, but in any event the better position would appear to be that with respect to the imposition here discussed, it is a "fee, penalty, charge or tax"

within the meaning of §626.061.

No necessity here exists to labor respectable aspects of the question which induced us to assume the original position in relation to the question mentioned above.

In view of the foregoing, in my opinion the question is answered as follows:

The assessment imposed by Florida industrial commission under §440.51 in excess of 2% is a tax within the meaning of §626.061, F. S. Hence, as to any foreign insurer in applying the provisions of §626.061, such assessment under §440.51 in excess of the general 2% premium receipts tax under §205.43, F. S., shall be considered and dealt with as a "tax" within the meaning of the former section. It is to be understood, of course, that in any event the amount of tax imposed by Florida must be paid; further, that the conclusions herein are subject to the proviso concluding subsection (1) and the provisions of subsection (2) of §626.061. This opinion supersedes the previous conclusion adopted by this office relating to this question.

057-174—June 20, 1957

COUNTY FINANCE

SECTIONS 30.47-30.54, F. S. (CH. 57-368); SHERIFFS; COUNTY TRAFFIC OFFICERS; BUDGETS, ETC., CH. 146, F. S., CH. 28944, 1953

To: *State Auditing Department, Tallahassee*

QUESTIONS:

1. In the light of Ch. 57-368, 1957, should funds for the maintenance of county traffic officers, operating under Ch. 146, F. S., be budgeted and paid by the sheriff, or should they continue to be budgeted and paid by the board of county commissioners?

2. In the light of said Ch. 57-368, should the expenses of county traffic officers, operating under Ch. 28944, 1953, be budgeted and paid by the sheriff or should they continue to be budgeted and paid as provided in said Ch. 28944?

Said Ch. 57-368, 1957, places the office of sheriff, in the counties within the purview of said chapter, on a salary instead of a fee basis. The salaries, including the sheriff's salary, and expenses of the office, are paid by the sheriff from budgeted funds provided by the county commissioners in accordance with the provisions of said chapter. Under this chapter the sheriff is required to prepare a tentative official budget for his office and submit the same to the board of county commissioners, as the budgeting authority, or to the county budget commission in counties having such budget commission. The act contemplates that this budget be sufficient for the proper carrying out of the powers, duties and operations of the sheriff's office during the ensuing fiscal year. This budget is required to provide for the sheriff's salary, salaries of deputies and assistants, expenses other than salaries, equipment, investigations, etc. No specific mention is made under said Ch. 57-368 of county traffic officers, their duties, compensation, equipment, etc., and whether they exist under Ch. 146, F. S., or other laws, such as Ch. 28944, 1953, setting up

traffic officers in particular counties. Under subsection (3) of §3 of said Ch. 57-368, the first budget under the act is required to be measured in part by the salaries and expenses of the office for the previous year. Heretofore the operation of the sheriff's office has been an obligation of the income of the office and not the county as such; under this act it becomes an obligation of the county, with the income of the sheriff's office being deposited in the proper county fund by the sheriff. No fees are payable to the sheriff's office as such by the county under the terms of this act; only such funds as are budgeted for the operation of the office are paid by the county to the sheriff's office.

Under Ch. 146, F. S., the county traffic officers therein provided for, although exercising their duties as deputy sheriffs, are largely under the control of the county commissioners. Their salaries are paid by county warrant instead of by the sheriff's office; their equipment is purchased by the county commissioners and any fees for arrests are paid, not to the sheriff's office, but into the fine and forfeiture fund of the county. The provisions of Ch. 28944 are in substance the same as those under Ch. 146, F. S.

We find nothing in said Ch. 57-368, 1957, which indicates any intention on the part of the legislature to change the status or the manner of paying county traffic officers under said Ch. 146, F. S., or Ch. 28944, 1953.

In the light of the above authorities and observations, the salaries and expenses of county traffic officers, under both Ch. 146, F. S., and Ch. 28944, 1953, should continue to be budgeted and paid by the board of county commissioners and not by the sheriff.

057-175—June 20, 1957

LEGISLATURE

EXPENDITURE OF FUNDS BY BOARD OF MANAGERS, HOUSE OF REPRESENTATIVES, IMPEACHMENT PROCEEDINGS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Is there an appropriation of money by house resolution 1946, or other legislative enactment, for use of the board of managers of the house of representatives which will permit payment of legal and clerical assistants or other necessary expenses in the preparation of the impeachment trial of Circuit Judge George E. Holt during the period intervening between the adjournment of the 1957 legislature and the convening of the senate as a court to try Judge Holt?

2. In the event question 1 is answered in the affirmative, may a lump sum be advanced to the board of managers for payment of the expenses contemplated in question 1?

The house of representatives of the 1957 legislature on May 27, 1957, pursuant to §29, Art. III, State Const., returned articles of impeachment against Circuit Judge George E. Holt. On the same day the house adopted house resolutions 1945 and 1946. The former empowered the speaker of the house to appoint

two members of that body as managers to conduct the impeachment proceedings against Judge Holt. The latter authorized those appointed as managers to employ necessary personnel to assist in the impeachment proceedings and incur necessary expenses, these to be paid out of legislative expense.

Section 4, Art. IX, State Const., prohibits withdrawal of state funds from the treasury "... except in pursuance to appropriations made by law."

AS TO QUESTION 1:

Attention is directed to Ch. 57-68, 1957, whereby any unused portion of the appropriation by Ch. 31498 of the special session of 1956 should be used and expended by the "special committee investigating impeachment proceedings of the House or Senate." It further provided that should the "impeachment investigations" not be complete by July 1, but be "extended by authority of the House or Senate," the unexpended funds under Ch. 31498 should not revert on July 1 "but may be used to finance the activities of such investigation." The act became law on May 8, 1957, was retroactive to April 1, 1957, and was in effect at the time of adoption of the house resolutions above mentioned. While by its terms said Ch. 57-68 refers to the "special committee investigating impeachment proceedings of the House or Senate," it must be viewed in light of §29, Art. III, State Const.

As noted above, said section gives the house of representatives the sole power of impeachment and provides that the officer against whom articles of impeachment are returned shall be tried by the senate. The word "investigating" as such should not be viewed in its limited or restricted sense, but is to be determined by and construed with the Florida constitution. It was apparently the intention of the legislature that any unexpended funds appropriated by Ch. 31498 should be available for the purpose of paying expenses of all matters and things relating to the impeachment proceedings, whether they be in the house or the senate. At the time of its passage and becoming law, the committee appointed under house resolution 63 to investigate charges against Judge Holt was in an active status. The subsequent report of that committee resulted in impeachment articles. It is, therefore, my view that whatever remains from the sums appropriated by Ch. 31498 is available to the board of managers appointed by the house of representatives for the payment of necessary expenses by way of investigation whether the same be paid to personnel or other expenses. This, as qualified, answers the question in the affirmative.

Should there not remain sufficient funds for the board of managers to properly investigate and conduct the impeachment proceedings before the senate, it is my view that whatever amount as may be necessary is to be considered a constitutional appropriation for the use of said board of managers (See *In Re Opinion of the Justices*, 145 Fla. 375, 199 So. 350).

AS TO QUESTION 2:

The board of managers has indicated an urgent and immediate need for funds with which to investigate the case, subpoena witnesses and otherwise prepare for trial. One of the managers has suggested that an initial sum of \$1,000 will probably be adequate. We recognize that without funds available for the purposes mentioned the preparation can be severely handi-

capped. Certainly it was never contemplated by the constitution and the legislature that those responsible for the prosecution should be hampered by lack of funds. It is my opinion that in view of the unusual circumstances the budget commission may properly establish a revolving fund in the stated amount for use by the managers. The board of managers, in the expenditure of these funds, should be subject to a strict and proper accounting in the manner approved by you.

Subject to these observations, the question is answered in the affirmative.

057-176—June 26, 1957

INSURANCE

SALE OF TRIP INSURANCE THROUGH VENDING MACHINES
UNDER FLORIDA INSURANCE LAW—CH. 644, F. S.—
§§644.01, 644.04, 644.07 AND 644.08, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

Will the sale of land trip insurance through vending machines, as described below, be permitted under the laws of Florida?

Relevant items in the file of the commissioner which accompanied the request consists of correspondence between Insurance Automat Corp. of America, a Georgia corporation, and Mr. John S. Ripandelli, chief life actuary, Florida insurance department; and certain other data from which some of the statements below derive. Also in the file is policy form 1910 proposed to be issued in pursuance of the plan by Federal Life and Casualty Co. of Battle Creek, Mich.

It appears that Insurance Automat Corp. holds the patents to a vending machine proposed to be used to deliver policies to the public, affording 24-hour land travel protection to insureds travelling by motor vehicles or as passengers of railroad and bus companies, as described, for the sum of twenty-five cents. Successive policies not to exceed an aggregate coverage of 365 days may be obtained. The policy form concludes with the words that, "The Federal Life and Casualty Company has caused this policy to be signed by its President and Secretary and countersigned by its duly authorized agent. . . ."

The following is quoted from the letter of the secretary and general counsel of Insurance Automat Corp. to Mr. Ripandelli: "Our proposed distribution of these policies is through appointed agents, who will be duly licensed in your state and bonded. Those agents will make a weekly report to this company and we, in turn, being under bond to Federal Life and Casualty Company, will make a monthly report to them and to you showing all sales made in your state."

At this point we are confused. From the foregoing it is evident that Federal Life and Casualty Co. is the insurer which proposes to issue these policies. On the other hand, the letter from the secretary and general counsel of Insurance Automat Corp., speaks of a mode of procedure which apparently involves activities of that corporation and *their* agents in connection with this plan in this state. The type of policy here sought to be

issued falls within the provisions of Ch. 644, F. S., relating to health and accident agents. Certain aspects of that chapter are mentioned. The phrase, "health and accident agent" means any person appointed as agent "to solicit applications for or negotiate and effect contracts of insurance"; and the word "insurer" means persons, firms, etc., "who are by authority of their charter, and further by authorization of the insurance commissioner engaged in the writing or issuing" of described coverage (§644.01). Such insurers must appoint agents who are qualified as required (§644.04). Agents so appointed to negotiate and effect such contracts of insurance must meet certain personal requirements and pass an examination (§644.07); provided that no written examination shall be required of, "An applicant who is a representative of a common carrier and who shall act as an agent only for the purpose of selling policies covering the risks of travel . . ." (§644.08). Certain of the sections of Ch. 644 were amended at the recent legislative session, but such amendments do not change the effect of the recited provisions.

In any event these policies proposed to be issued may be offered to the public and sold in this state *only* by an insurer holding a certificate of authority from the commissioner and *only* through agents of such insurer duly qualified under provisions of Ch. 644. Hence, the conclusion below is not to be construed as approving a plan which violates any provision of Ch. 644.

For quite a number of years the use of machines of this general nature for sale of accident coverage to airline passengers has been acquiesced in by the commissioner. Quite apparently, the use of such machines has fulfilled a necessity and a public demand closely related to airline passenger traffic. The use of such machines has long been known and accepted by the public, including members of our legislature. Quite a number of legislative sessions have intervened since use of the machines was initiated; and reasonably we may assume that if the apparent administrative ruling by the commissioner sanctioning their use had appeared to our legislature as not authorized, that body would heretofore have condemned such construction. It must follow that the administrative construction, as a matter of equal protection, must tolerate the plan here considered or the construction must fall.

In view of the foregoing, in my opinion the question is answered as follows:

These policies may be sold in Florida by means of the machines mentioned, subject to the following conditions: (1) That Federal Life and Casualty Co. hold a certificate of authority issued by the insurance commissioner to issue such coverage in this state. (2) That the coverage be sold in this state by agents of said insurer duly qualified under the provisions of Ch. 644, F. S., and that the machines so used shall be under the exclusive control of said agents. (3) That the insurance commissioner shall determine that the provisions of the policy conform to or do not offend any of the provisions of Ch. 642, F. S., relating to accident coverage.

057-177—June 21, 1957

**STATE OFFICERS AND EMPLOYEES
RETIREMENT UNDER §112.05, F. S., EFFECT OF WORKMEN'S
COMPENSATION PAYMENTS**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a person has been employed by the state for more than 30 years, consecutive except for one or more periods of time when, because of an injury or otherwise, he was under workmen's compensation, may he qualify for retirement under §112.05, F. S.?

Section 112.05, F. S., provides that when any "state official or employee, irrespective of age, has served the state as either an official or employee or both for *thirty consecutive years or more* . . . such official or employee may retire from his office as such official or employee. . . ." (Emphasis supplied.) The question is whether there has been *consecutive employment* when one, because of injury or otherwise, goes off the state pay roll and on workmen's compensation for a period of time?

Workmen's compensation, and the right thereto, has been held to be based on the fact of employment, the liability arising out of the relationship of employer and employee. These rights have been said to arise out of and are an incident to the contract of employment (71 C. J. 239, §11). Workmen's compensation has been said to have an analogy to in other ways. Our workmen's compensation statutes, in so far as public employees who have been brought under the statute by the legislature, are to be read into every contract of employment (*Florida Forest Service v. Strickland*, 154 Fla. 472, 18 So. 2d 251, text 254; *Fidelity and Casualty Co. v. Bedingfield*, Fla., 60 So. 2d 489, text 493). Workmen's compensation payments are not damages, charity, bounties, pensions or penalties (71 C. J. 232-233, §§6 and 7) but constitute compensation for the disability suffered in connection with the employment. The right to such compensation has been said to arise out of the employment, that is, out of the relationship of employer and employee (71 C. J. 239, §11).

An assistant state auditor on sick leave on July 1, 1945, was held to be an employee of the state and eligible for membership in the former state officers and employees retirement system notwithstanding he was not on the pay roll as of that day (1945-6 Biennial Report 207). An employee of the state, because an appropriation was used up two months before the end of the fiscal year, was laid off for two months; this was held not to break the required continuous employment required by §112.05, F. S. (1945-6 Biennial Report 216). These opinions of this office seem to place a liberal construction on the requirements for retirement in this state. Where a state employee, by reason of injury or sickness within the workmen's compensation statutes, goes off the pay roll and on workmen's compensation, there is raised a presumption that he is placed on sick leave by the state agency employing him and he remains in effect a state employee although temporarily off duty due to injury or sickness.

In the absence of evidence that the employee was discharged by the employing agency during the time on workmen's compen-

sation it is to be presumed that he was on sick leave and remained a state employee without compensation other than workmen's compensation and the above question is answered in the affirmative.

057-178—June 21, 1957

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—CONTINGENT LIABILITIES—SURETIES—§§199.02(3), 199.05, 199.11(3) AND 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is a mortgage encumbering real property in this state, given by a contractor to the surety upon his performance bond to protect such surety against loss under its said bond due to the default of such contractor, subject to taxation as class "C" intangible personal property?

So long as the contractor carries out the terms and requirements of the said contract and pays all obligations thereunder there will be no obligation subject to enforcement under the mortgage contract. The obligation is contingent and no obligation will arise thereunder until and unless there be a breach of the terms of the contractor's contract for which the mortgage was given to secure. Until there is a loss under the contractor's performance contract, or there is a failure on the part of the contractor to make good such default, no obligation under the mortgage contract can arise. The mortgage liability is purely contingent and may never mature or accrue. In some ways the liability is similar to a contract for future advances. The surety upon the default of the contractor, or upon his failure to carry out the contract, in effect is required to make advances of its funds for the account of the contractor.

This being a democracy "every parcel of property is expected to bear its due portion of the burden of government," unless exempted by law (*Bancroft Invest. Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 170). Section 1, Art. IX, and §16, Art. XVI, State Const. seems to contemplate the taxation of all valuable property within the state, except such as may be exempted under said sections. Generally for a chose in action to be subject to taxation it should be a legal demand such as the law will recognize and enforce, fixed and certain and *not indefinite or contingent*, and liquidated as to its amount (84 C. J. S. 190, §78). In case there should be an assignment of the mortgage in question, how could the tax assessor or any other person determine and fix the value of the promise to pay until there has been a breach of the same and the damages liquidated?

The above question seems to contemplate the possibility of taxation under §199.02(3), and §199.11(3), F. S., which is imposed on "all notes, bonds and obligations . . . for payment of money, which are secured by mortgage . . . encumbering real property in this state" at the rate of two mills on "the principal amount of the indebtedness evidenced by such obligation" While the above statutes place an ad valorem tax on such property, §201.08, F. S., places a documentary stamp tax on "promis-

sory notes, non-negotiable notes, written obligations to pay money" In §§199.02 and 199.11, the phrase is "notes, bonds and obligations," while in §201.08 the phrase is "promissory notes, non-negotiable notes, obligations to pay money" The courts, in *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, and *Lee v. Kenan*, CCA 5th, 78 Fed. 2d 425, 100 A. L. R. 869, applying the rule of *ejusdem generis*, held that contingent obligations (contracts for future advertisement, the compensation to depend on future orders, and electricity to be metered and paid for as used) were not within §201.08, F. S. Applying the same rule to §§199.02(3) and 199.11(3), F. S., indicates a similar conclusion. This seems to be the construction placed on similar documentary stamp tax laws of the federal government by the enforcement authority by §113.56, federal tax regulations.

Under §199.05, F. S., "the tax assessor shall assess all intangible personal property at full cash value." Until there has been a breach of the conditions of the mortgage agreement by default, so that the monetary obligation of the mortgagee may be ascertained how may the full cash value of the obligation of the mortgagee to the surety be ascertained? Should the mortgagee offer the mortgage for sale, how could the value of the same ever be ascertained with any degree of certainty? A promissory note or a bond obligating the maker to pay a sum certain and liquidated at all events, has a value which may be ascertained by a tax assessor; but how may the value of the obligation of the mortgagor, in the mortgage in question, to the mortgagee be ascertained by the tax assessor or any other person until there has been a breach of the conditions?

These observations seem to lead to a negative answer to the above question, unless and until there has been a breach of its terms and an ascertainment of the damages. Although reference has been herein made to the documentary stamp taxes, this opinion shall not be taken as applicable to documentary stamp tax questions upon the same instrument.

057-179—June 21, 1957

INSURANCE

SURETY CONTRACT IN RELATION TO DEPOSIT UNDER
§626.25, F. S.—§§625.01(6), 626.04, 627.72(1), 630.01,
631.06 AND 648.02, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Does the wording in §626.25, F. S., to the effect that the voluntary deposit by an insurer therein permitted shall be "for the common benefit of all the holders of its policies of insurance," include obligees of bonds?

Section 626.25, F. S., provides that any insurance company organized under the laws of this state and doing a "fire, casualty or title insurance business, in this state or elsewhere" may deposit with the insurance commissioner "for the common benefit of all the holders of its policies of insurance" cash or securities as described, "in such amounts as it may from time to time desire, in addition to all other deposits required by it by the laws of this state, which cash or securities shall be held by said

insurance commissioner in trust for the purposes and objects herein specified."

Section 625.01(6), F. S., defines "insurer" as any persons, etc., "who issue, or enter into, contracts or policies of *insurance, indemnity or surety* with another;" and to like effect see definition of "insured" in the preceding subsection. Chapter 627, F. S., relates to "*fire, casualty and surety agents*," and §627.72(1) thereof provides that "except where the type of insurance may be specifically defined the word 'insurance' wherever used in this chapter shall be held to include physical damage, *fire* and its allied lines, aviation, marine, *casualty*, workmen's compensation, inland marine, or *surety*, including *fidelity, guaranty or surety bonds*, public liability or property damage insurance." Chapter 630, F. S., relates to "rates for *casualty* insurance and *fidelity, guaranty and surety bonds*;" and §630.01 thereof opens with the wording, "This chapter applies to *casualty* insurance, including *fidelity surety and guaranty bonds* . . ." Section 626.04, F. S., relating to investments of domestic insurers, recites that, "Domestic *insurers and surety* companies. . . ." (Emphasis supplied in quoted matter).

"Casualty" insurance is commonly held "to include those forms of indemnity providing for payment for loss or damage to property, except from fire or the elements, resulting from accident or some other unanticipated contingency, and for loss through accident, or casualties resulting in bodily injury or death. The term however is more properly applied to insurance against the effect of accidents resulting in injuries to property." 44 C.J.S. 475, 476, §6.

A contract of suretyship is to be distinguished from a contract of indemnity. *Royal Indemnity Co. v. Knott, Fla.*, 136 So. 474; 50 Am. Jur. 909, §8. Contracts guaranteeing the fidelity of employees and persons holding positions of trust are generally considered as insurance contracts regardless of the specific forms thereof. 44 C.J.S. 477, §13.

To engage in the surety business in this state, compliance must be had with the provisions of Ch. 648, F. S., relating to sureties and surety companies. As noted heretofore from several of the quoted provisions, at least for the purpose of supervision the surety business is considered as the business of insurance; and in other jurisdictions under similar circumstances contracts of suretyship are treated as contracts of insurance. *New York Indemnity Company v. Hurst, Ky.*, 66 S.W. 2d 8; *State v. London and Lancaster Ins. Co. of America, Conn.*, 200 A. 567.

In view of the foregoing, in my opinion the question is answered as follows:

As stated, under our laws surety business is treated as the business of insurance. However, it is to be noted that in our statutes distinctions have been drawn between "casualty" insurance and "surety" contracts. In absence of a court construction to the contrary, and particularly in view of the purpose of the question, I feel that sufficient doubt exists to suggest that the Massachusetts authorities should not consider that obligees of fidelity, guaranty and surety bonds of an insurer or surety company are included in the words in §626.25, "shall be for the common benefit of all the holders of its policies." Hence, the question is answered in the negative.

The Massachusetts authorities are correct in their conclusions that "Florida requires foreign fire insurance companies to make a

\$20,000 deposit or file a \$20,000 surety bond in Florida" (§631.06, F. S.) "and foreign surety companies to make a \$75,000 deposit in Florida" (§648.02, F. S.).

057-182—June 24, 1957

INSURANCE

ACCIDENT AND HEALTH AGENTS—LIMITED TRAVEL ACCIDENT LICENSES WITHOUT EXAMINATION UNDER

§644.07(3) (b), F. S.—CHS. 323 AND 350, §§323.03
AND 323.05, F. S.

To: J. Edwin Larson, *Insurance Commissioner, Tallahassee*
QUESTIONS:

1. Is the manager, operator or employee of a rent-a-car agency or service eligible for license under §644.07(3) (b), F. S.?

2. Is the manager, operator or employee of a travel agency eligible for such license?

Chapter 644, F. S., relates to accident and health agents, and §644.07(3) (b) thereof provides that no written examination for license shall be required of "An applicant who is a representative of a common carrier and who shall act as an agent only for the purpose of selling policies covering the risks of travel; such applicant's license shall be boldly stamped on the face with this restriction."

We feel that "common carrier" as used above is to be construed, with respect to this question, in the light of its definition and use in Ch. 350, F. S. (railroad and public utilities commission) and related statutes. Chapter 323, F. S., deals with auto transportation companies, involving duties of said commission. Section 323.03 requires that auto transportation companies operating motor vehicles in the transportation of persons or property as *common carriers* shall obtain from the commission a certificate of public convenience and necessity. Section 323.05 requires that such a company operating a "for hire" motor vehicle on the public highways, shall obtain a permit from the commission; and there is special provision for those companies operating taxi cabs. In the case of *Lawrence v. Goddard*, Fla., 168 So. 13, our court held that companies leasing or renting automobiles without drivers were not auto transportation companies within the purview of Ch. 323. Had such companies so leasing or renting automobiles been included in said chapter doubt would exist that they would have been classified as common carriers; however, they were not and they are not here considered as common carriers.

A travel agency may or may not be the agent of a common carrier. If such an agency is authorized to sell tickets of a common carrier to persons, it is the agent of the common carrier. On the other hand, if the function of such an agency is limited to procuring tickets from a common carrier for persons upon their request, the agency is the agent of such persons.

In view of the foregoing, in my opinion the questions are answered as follows:

1. The manager, operator or employee of a rent-a-car agency is not the representative of a common carrier within the meaning of §644.07(3) (b), F. S., and hence cannot be licensed under the

provisions thereof.

2. The manager, operator or employee of a travel agency may be the representative of a common carrier only if such agency is the agent of such a carrier, as above explained; and only under such circumstances would such manager, operator or employee be eligible for license under said §644.07(3) (b).

057-183—June 24, 1957

COUNTY FINANCE & TAXATION

COMMENCEMENT OF TAX ASSESSMENTS FOR LAKE CONWAY WATER AND NAVIGATION CONTROL DISTRICT, ORANGE COUNTY—CH. 57-1643— (H.B. 1626, 1957 SESSION)

QUESTION:

Should the taxes imposed by §§16 and 17, house bill 1626, of the 1957 regular session of the state legislature, be assessed and levied for the tax year of 1957?

House bill 1626, of the 1957 regular session of the Florida legislature provides for the setting up of the "Lake Conway Water and Navigation Control District," in the Lake Conway area of Orange county. The area embraced in the district is set out in §1 of the said house bill. The district board is given the "power to annually assess, levy and collect a special tax upon the lands in the district, which special tax shall be in addition to all other taxes levied and assessed for state and county purposes," however, these special taxes may not exceed two mills on the dollar of valuation fixed by the county tax assessor for Orange county, for the lands within said district. (§16 of said house bill.) These taxes are to be assessed and collected "from all land within said district" until "all warrants, checks, bonds or other indebtedness shall have been paid in full and cancelled." These provisions seem to contemplate ad valorem taxes and not special assessments for benefits. The constitutionality of the said house bill is presumed, but not here decided, for the purposes of this opinion.

"Where a statute imposing a tax is enacted during the fiscal year, it has been held invalid as retroactive so far as it applies to that part of the year already expired (2 Cooley on Taxation, 4th. Ed. 1156, §522; see also 2 Cooley on Taxation, 4th Ed. 1145-1152, §514). In the absence of anything in the statute to the contrary, a statutory limitation of the rate or amount of taxation is prospective only, and not retroactive, in operation (84 C.J.S. 695, §361; 61 C.J. 569, notes 24, 25 and 26). Charges and penalties on delinquent taxes are not usually retroactive and do not impose the penalties therein on taxes already delinquent, unless made applicable by the statute (Annotation in 77 A. L. R. 1136-1138). A statute is not to be given retroactive effect unless its terms show that such effect was intended (Miami v. Board of Public Instruction, Fla., 72 So. 2d 901; Larson v. Independent Life and Accident Co., 158 Fla. 623, 29 So. 2d 448; State v. Lee, 156 Fla. 494, 23 So. 2d 575.) We find nothing in the said house bill indicating an intention to make the taxes therein mentioned retroactive to Jan. 1 of this year. In this state taxes are assessed as of Jan. 1 of the tax year (§192.04, F. S.)

The above question is answered in the negative in the light

of the above mentioned authorities. Taxes will first be assessed under said house bill on the 1958 tax roll.

57-185—June 25, 1957

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—CONSTRUCTION
OF CH. 57-399 (H.B. 2178, S.B. 1417) AMENDING
§199.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the increased millages levied by house bill 2178, of the regular session of the 1957 Florida legislature, applicable to the tax year of 1957?

Said house bill, although passed by both houses of the state legislature, has not yet become law and this opinion shall be operative and effective only if and when the said house bill becomes a law. This house bill proposes to amend §199.11(1) and (2) F. S., and increases the taxes levied and assessed therein. The tax on class "A" intangible personal property is increased from one-twentieth mill on the dollar of taxable valuation to one-tenth mill; and on class "B" intangible personal property the tax was increased from one mill to two mills.

In the absence of anything in the statute to the contrary, a statutory limitation on the rate or amount of taxation is prospective only and not retroactive in operation (84 C. J. S. 695, §361; 61 C. J. 569, notes 24, 25 and 26). "Where a statute imposing a tax is enacted during the fiscal year, it has been held invalid as retroactive so far as it applies to that part of the year already expired" (2 Cooley on Taxation, 4th. Ed., 1156, §522; see also 2 Cooley on Taxation, 4th. Ed. 1145-1152, §514.) As a general rule, laws imposing taxes and license fees are construed strictly against the taxing power and liberally in favor of the taxpayer, and this rule is especially applicable where the statutes are ambiguous or doubtful (82 C. J. S. 948, et seq., §396). House bill 2178 leaves us in doubt as to its application to the intangible personal property taxes assessed for the 1957 tax year.

The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention of the legislature in enacting the statute (82 C. J. S. 560, et seq., §321). There is no invariable rule for the discovery of the legislative intent, but the question must be decided from the peculiar facts and circumstances of each enactment (82 C. J. S. 571, section 322). In construing a statute and ascertaining its effect the court may look to the object to be accomplished, the evils and mischief to be remedied, the purpose to be subserved, and other matters (82 C. J. S. 593, et seq., §323).

The section amended provides that "on and after January first, 1942, there is hereby *annually* levied and assessed" certain millages, which have been changed by said House Bill No. 2178 as to Class "A" and Class "B" intangible personal property. The said house bill by its terms "shall take effect on July 1, 1957" which is in the middle of the 1957 tax year. Under §192.04, F. S., "all real and personal property shall be *subject to taxation* on the first day of January of each year, and shall be a lien upon such property . . ."

(Emphasis supplied.) Under statutes of this nature taxes for the entire year accrue on Jan. 1, and not month by month, week by week or day by day (see *U. S. v. Alabama*, 313 U. S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327). However, in this state the valuation of the taxable property is not complete until equalization, which, under §193.25, F. S., is the first Monday in July of the tax year. The taxes assessed against real and personal property in this state are not extended until after the equalization; this being true the increased intangible personal property taxes imposed by said house bill 2178, might be applied to the 1957 tax roll with little if any additional trouble, if we find from the legislative records evidence of an intent on the part of the legislature to apply the increased tax to the 1957 tax rolls.

We now pass to §6 of house bill 2176, of the 1957 regular session of the Florida legislature, which shows that said house bill together with house bill 2178, and another act, are to compose a package or group of taxing statutes. This section shows a design on the part of the legislature to raise a total of \$120,000,000 biennially in new or additional taxes, evidently to provide funds to meet the requirements of the 1957 biennial appropriations act. In this connection see also the conference committee's report, of June 7, 1957, to the president of the senate and speaker of the house, concerning senate bills 1137 and 2166. When this conference committee report, said §6 of house bill 2176, the fact that house bill 2178 is to take effect on July 1, 1957, and the dire need for additional taxes to meet the 1957 general appropriations act, are taken into consideration and considered together, we feel that it was the intention of the legislature, when it enacted said house bill 2178, that the increased millages therein provided be applied to the 1957 intangible personal property tax rolls.

The above question is, therefore, answered in the affirmative.

057-187—June 27, 1957

CRIMINAL PROCEDURE

APPEARANCE BONDS—POWERS OF CONSTABLES—FEES—

§§903.34(1) (2), 30.23, 55.34, 76.18, 78.13, 78.18, F. S.

To: *Jess Mathas, Clerk, Circuit Court, DeLand*

QUESTION:

Where a constable arrests a person without a warrant and, instead of carrying him before a magistrate, accepts from him an appearance bond returnable before the county judge or a justice of the peace, is the county liable to pay said constable a fee for writing, taking and approving said bond?

Section 901.23, F. S., requires that an officer who has arrested a person without a warrant shall, without unnecessary delay, take the person arrested before the nearest or most accessible magistrate in the county in which the arrest is made, having jurisdiction, and shall make before the magistrate a complaint, or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county. It is the constable's duty to comply with this statute instead of accepting an appearance bond.

I find no provision of law which authorizes a constable either

to set the amount of bail or to accept a bail bond when he makes an arrest without a warrant.

Section 903.34(1), F. S., deals with what officers may admit to bail, but it does not authorize a constable to admit to bail. Nor do I find any other provision of law which authorizes a constable to admit to bail. When the constable accepts a bail bond from a person arrested by him without a warrant, without carrying such person before a magistrate, he admits that person to bail without being authorized by law to do so.

Even if the person arrested by a constable without a warrant is carried before the county judge or justice of the peace and even if the county judge or justice of the peace sets the amount of bail, the constable has no authority to take and approve an appearance bond for the defendant. Section 903.34(2), F. S., prescribes the officers by whom bonds may be approved in such cases, but it makes no mention of constables. The result is that a constable has no legal authority to take and approve appearance bonds in such cases.

I am aware of the fact that §30.23, F. S. which provides fees for both sheriffs and constables, authorizes a fee of \$2 for "Bonds, writing, taking and approving." This fee may be collected by a constable only when he acts within his lawful authority in writing, taking and approving a bond, as, for example, a forthcoming bond made under authority of §55.34 to procure the release of property levied upon under execution, or a forthcoming bond given under §76.18 to procure the release of attached property, or a forthcoming bond made under §78.13 to procure the release of property seized under a replevin writ. Section 30.23 does not purport to enlarge the authority of a constable with respect to what kinds of bonds he can take and approve; it does not even hint that it means to authorize him to take appearance bonds despite the denial of that authority by the other statute mentioned above; it merely authorizes a \$2 fee when he writes, takes and approves a bond which the law authorizes him to write, take and approve, and the law does not authorize him to write, take and approve an appearance bond under the circumstances related in your above-stated question.

Since a constable has no lawful authority to take and approve an appearance bond under said circumstances, it is my opinion that the county is not liable to pay him a fee for doing so, and that your said question is properly answered in the negative.

I realize that in many cases the constable's costs would be reduced and the convenience of arrested persons would be better served if a constable were empowered to take and approve an appearance bond on the spot when he makes an arrest without a warrant, but the legislature has seen fit to withhold this power from constables and we are bound by the law as enacted by the legislature.

057-188—June 27, 1957

EDUCATION

PERSONNEL OF SCHOOL SYSTEM—CONTRACTS WITH
INSTRUCTIONAL STAFF AND WITH PROFESSIONAL
ADMINISTRATIVE ASSISTANTS—§231.36, F. S.

To: Thomas D. Bailey, Superintendent of Public Instruction,
Tallahassee

QUESTION:

In cases where a classroom teacher, for instance, is promoted to a higher position such as principal, or a principal is promoted to a higher position such as supervisor in a county of the state, may such teacher or principal legally be issued a continuing contract in the higher position before serving at least three probationary years in such position and before having been reappointed for the fourth successive year?

Section 231.36, F. S., provides, in part:

Effective July 1, 1951, each member of the instructional and administrative staff in each county school system, except in counties operating under local, special or general tenure laws with stated population application, who holds a regular certificate based at least on graduation from a standard four-year college, who has completed three years of service in a county of the state and who has been reappointed in such county for the fourth successive year, shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board; provided, that the period of service provided herein may be extended to four years when prescribed by the county board and agreed to in writing by the employee. Each person to whom a continuing contract has been issued as provided herein shall be entitled to continue in his position or in a similar position in the county at the salary schedule authorized by the county board without the necessity for annual nomination or reappointment until such time as the position is discontinued, the person resigns or until his contractual status is changed as prescribed below:

The above quoted act is intended to provide tenure benefits for teachers who qualify for a continuing contract *in the position held* (or a similar position) *at the time they qualified* for and received their continuing contracts.

There is nothing in the act to indicate a legislative intent that a teacher who is promoted to a better position would immediately achieve tenure rights to the higher position.

In other words, a continuing contract right to any given position is achieved only after the probationary period prescribed by the statute is satisfactorily completed.

If a teacher is promoted to a higher position, it is my opinion that said teacher's continuing contract status as to the former position would continue unchanged until the necessary three-year probationary period had been served and the teacher had been reappointed for the fourth successive year in the higher position. At that time the teacher would be entitled to a continuing contract in the higher position.

Your question, subject to the above observations, is answered in the negative.

057-189—July 1, 1957

MOTOR VEHICLES

SALES OF MOTOR VEHICLES—DUTY OF MOTOR VEHICLE COMMISSIONER—TRANSFER OF TITLE UNDER §212.08(3), F. S. AS AMENDED BY CH. 57-398

To: Ina S. Thompson, Motor Vehicle Commissioner, Tallahassee
QUESTION:

What are the duties of the motor vehicle commissioner, under §212.08(3) F. S., as amended by Ch. 57-398, 1957, when an application is received for the transfer of title to a motor vehicle from a seller, who is not a motor vehicle dealer, to a purchaser?

Chapter 57-398, 1957, amended §212.08, F. S., so as to delete the tax exemption of motor vehicles from sales tax in part and permit a 1% tax on the retail sale of motor vehicles. Section 212.05, F. S., declares it to be "the legislative intent that every person is exercising a taxable privilege who engages in the business of *selling tangible personal property at retail in this state.*" (Emphasis supplied.) A bona fide sale of a motor vehicle from its owner, who is not a motor vehicle dealer (which includes dealers in second-hand vehicles), is not subject to the said sales tax. This contemplates an honest and bona fide sale, and not a sale for the account or benefit of another who may be a motor vehicle dealer. Where a motor vehicle is sold by or for the account of a motor vehicle dealer no title certificate may be issued "unless there be filed with such application for title certificate a receipt issued by an authorized motor vehicle dealer or by the comptroller evidencing the payment of such tax where the same is payable" (§212.08(3) F. S. as amended). Said subsection further provides that "other provisions of this chapter relating to casual sales and trade-ins are applicable to motor vehicles; *however, all transfers of title to motor vehicles are presumed to be taxable transactions until otherwise shown.*" (Emphasis supplied.)

This brings us to the construction of the above provision that "all transfers of title to motor vehicles are presumed to be taxable transactions until otherwise shown." This provision, which follows the provision that "no title certificate shall be issued by the motor vehicle commissioner on any motor vehicles unless there be filed . . . a receipt . . . evidencing the payment of such tax where the same is payable," seems to place the burden of showing nontaxability on the person making application for a transfer of title.

It, therefore, seems that when an application for a transfer of title to a motor vehicle is received in the office of the motor vehicle commissioner, and it clearly appears from the said application and the office file that the transaction was one not subject to a sales tax, then a transfer of title may be made without further proof of nontaxability; however, should the motor vehicle commissioner entertain any doubt on the question, the applicant may be required to submit proof to overcome the presumption of taxability.

057-190—July 2, 1957

TAXATION

REAL PROPERTY—CONSTRUCTION OF CH. 57-195 (§193.11
(3), F. S.)—PROSPECTIVE OR RETROACTIVE—
§193.25, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is §193.11(3), F. S., added to said section by Ch. 57-195, 1957, applicable to the 1957 tax assessments of real property?

Said Ch. 57-195 has no provision fixing its effective date; this being true, it will take effect "sixty days from the final adjournment of the session of the legislature at which it" was enacted (§18, Art. III, State Const.). The 1957 regular session of the legislature adjourned on June 8, 1957; this being true the act will become effective on Aug. 7, 1957. In this state lands are assessed for taxes as of January 1 of the tax year (§192.04, F. S.). Valuations are made, and the right to homestead tax exemption and other exemptions, as of that date. Tax assessors are required to "complete the assessment rolls of their respective counties on or before the first Monday in July in every year," on which day the tax assessor is required to meet with the board of county commissioners sitting as a board of tax equalization. (§193.25, F. S.). The equalized assessments furnish the basis for the fixing of the millages by the county commissioners and other boards and commissions. After the equalization of the assessments the tax assessor proceeds, using the millages furnished him, to complete the assessment roll by extending the amount of the taxes, which is based upon the equalized assessments.

In the absence of anything in the statute to the contrary, a statutory limitation on the rate or amount of taxation is prospective only and not retroactive in operation (84 C. J. S. 695, §361; 61 C. J. 569, notes 24, 25 and 26). "Where a statute imposing a tax is enacted during the fiscal year, it has been held invalid as retroactive so far as it applies to that part of the year already expired" (2 Cooley on Taxation, 4th Ed., 1156, §522; see also 2 Cooley on Taxation, 4th Ed. 1145-1152, §514). As a general rule, laws imposing taxes and license fees are construed strictly against the taxing power and liberally in favor of the taxpayer, and this rule is especially applicable where the statutes are ambiguous or doubtful (82 C.J.S. 948, et seq., §396).

The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention of the legislature in enacting the statute (82 C. J. S. 560, et seq., §321). There is no invariable rule for the discovery of the legislative intent, but the question must be decided from the peculiar facts and circumstances of each enactment (82 C. J. S. 571, §322). In construing a statute and ascertaining its effect the court may look to the object to be accomplished, the evils and mischief to be remedied, the purpose to be subserved, and other matters (82 C. J. S. 593, et seq., §323).

We find nothing in said Ch. 57-195, or in the records of the legislature, which even indicates an intention on the part of the legislature to make said chapter applicable to the 1957 tax rolls. The above question is, therefore, answered in the negative. Its

first application to county tax assessment will be to the 1958 assessment and rolls.

057-191—July 2, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COMPENSATION OF COUNTY PROSECUTORS—§§125.04,
322.25(3), and 34.11, F. S.**

To: State Auditing Department, Tallahassee

QUESTIONS:

1. Does the provision in §322.25(3), F. S., authorize a county prosecuting attorney, compensated under §125.04, F. S., to receive a conviction fee for each bond estreated in his court in connection with a traffic offense?

2. If the answer to the 1st question is in the affirmative, then is the fee payable under §34.11, F. S., for the estreatment of a cash bond for a traffic offense \$5 or 10% of the amount of the bond?

3. Would the conviction fee be payable in similar circumstances to a county attorney compensated under §5 of Ch. 27781, 1951?

Under §125.04, F. S., the compensation of the county prosecuting attorney "shall be not less than three hundred dollars or more than six hundred dollars per annum, payable monthly, and in addition thereto said attorney shall be entitled to and shall receive the same fees for conviction as are now or may hereafter be provided by law for attorneys in county courts as conviction fees in cases prosecuted before county court . . ." Under §34.11, F. S., the prosecuting attorneys for the county courts are paid "five dollars for each conviction and shall also receive 10% of each cash bond estreated in his court in connection with which an investigation is made and an information is filed . . ." In a former opinion of this office (1941-2 B. R. 49) it was held that, no mention being made in §125.04 of bond estreatures, no compensation may be paid to the county prosecuting attorney under §125.04 for bond estreatures. Opinions 045-188 (1945-6 B. R. 240), 050-558 (1949-50 B. R. 189) and 052-95 (1951-2 B. R. 59) hold that no compensation for bond estreatures is provided by said §125.04, F. S.

Section 322.25(3), F. S., provides that "*for the purpose of this chapter* (meaning Ch. 322, F. S.), a forfeiture of bail or collateral deposit to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction." (Emphasis supplied.) The italicized portion of the above quotation from said §322.25 seems to limit its operation to the purposes of Ch. 322, F. S., which would not include §125.04, F. S. Opinion 045-188 (1945-6 B. R. 240) involved the question of fees under said section where bonds are estreated or forfeited *in traffic violations*, and held that no fees may be paid for such estreatures.

These observations answer the 1st above question in the negative. The 1st question being answered in the negative, the 2nd question is unanswered.

Section 6 of Ch. 27781, 1951, provides that "the said county attorney shall receive as compensation for his duties as prosecuting

attorney, five dollars for each conviction or plea of guilty or nolo contendere in all criminal cases before the county judge's court" No mention is made of compensation in connection with estreatures or bond forfeitures. Applying the same observations as above made concerning §§125.04 and 322.25, F. S., the 3rd above question is answered in the negative.

057-192—July 2, 1957

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COUNTY PUBLIC OFFICERS, PERSONAL ATTENTION TO
DUTIES OF OFFICE—PARTICIPATION IN PRIVATE
BUSINESS—§17, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Do the statutes and laws of Florida prohibit county public officers engaging in private business in their counties?

Section 17, Art. XVI, State Const., provides that "no person shall hold any office of trust or profit under the laws of this state without devoting his personal attention to the duties of the same." Under §15, Art. IV, State Const., a public officer may be suspended or removed from office for "malfeasance, misfeasance or neglect of duty in office" (Emphasis supplied.) We find no statute of this state expressly prohibiting a public officer from engaging in business while he holds such public office.

It has been held, under a statute permitting removal from office for neglect of duty, that an officer who engages in a business or occupation is not subject to removal unless such business or occupation is such as to cause him to neglect his official duties (67 C. J. S. 249, §60).

We conclude that the statutes and laws of Florida do not prohibit a county public officer engaging in private business in the county so long as there is no neglect of the duties of his office and the business engaged in is not inconsistent with or incompatible to his official duties.

057-193—July 3, 1957

TAXATION

EXCISE TAXES ON BEER SHIPPED BY MANUFACTURER TO
OUT-OF-STATE CUSTOMER—CHS. 561 AND 562,
§§561.14 AND 561.49, F. S.

To: *J. D. Williamson, State Beverage Director, Tallahassee*

QUESTION:

Where beer, within the purview of Chs. 561 and 562, F. S., is manufactured in this state and sold and shipped, by such manufacturer, to distributors or vendors, located in other states, what taxes, if any, should be imposed and collected by the state beverage department on such sales?

Section 561.49, F. S., provides, in so far as is here material, that "the excise taxes provided for in this chapter (i.e., Ch. 561, F. S.,) shall be paid as to all beverages sold within this state. No excise taxes shall be required to be paid by manufacturers or distributors as to the sale of beverages which are actually delivered by such

manufacturer or distributor to persons outside of the state in places where the sale of such beverages is authorized by law The burden shall always be on the manufacturer or distributor to show to the satisfaction of the director by bill of lading of a common carrier or other satisfactory evidence that delivery was made outside the state in accordance with the laws of the place of delivery." (Emphasis supplied.) It seems clear from the above statute that the burden of showing that *the beverages were actually delivered*, by the manufacturer or distributor, *to persons outside of the state*, is upon the person who claims exemption under said §561.49, F. S.

Beverage licenses are classified, by §561.14, F. S., as to "(1) manufacturers who shall be licensed to manufacture the beverage herein referred to and distribute the same at wholesale to licensed distributors and licensed vendors and to no one else within the state . . ." and as to "(2) distributors who when so licensed shall be permitted to sell and distribute the beverages herein referred to at wholesale to other licensed distributors, to licensed vendors . . . to nonresident dealers, and to no one else within this state. . . ." As used in this section "(3) vendors shall include persons, associations or corporations selling the beverages referred to at retail only." To be exempt from excise taxes, under §561.49, the beverages sold to persons, firms and corporations in other states must be to distributors or at wholesale and must be "actually delivered by such manufacturer or distributor to persons outside of this state *in places where the sale of such beverages is authorized by law*." (Emphasis supplied.) The city, county or other place where delivered must be in fact a place where sales of the beverages shipped are authorized by the laws of or applicable to such place. Any shipment of such beverages to a place where the sale of such beverages *is not authorized by law* is subject to the excise taxes of this state notwithstanding it may be an interstate shipment.

Where beer, within the purview of Chs. 561 and 562, F. S., is manufactured in this state and sold and shipped, by such manufacturer, to distributors or vendors, located in other states, no Florida excise taxes may be imposed or collected by the state beverage department on such sales so long as such beer is "actually delivered by such manufacturer . . . to persons outside of the state in places where the sale of such beverages is authorized by" the laws of the place to which shipped. If sales of such beverages *are not permitted* by the laws of the place to which shipped then such beer shipped would be subject to the Florida excise taxes.

057-194—July 8, 1957

PUBLIC LANDS AND PROPERTY

SALE OF STATE-OWNED SUBMERGED LANDS—NOTICE TO RIPARIAN OWNERS OF UPLANDS—§253.12(1), F. S. AS AMENDED BY CH. 57-362

To: Van H. Ferguson, State Land Agent, Tallahassee
QUESTIONS:

1. Are notices to be mailed to the riparian upland owners, whose uplands front other bodies of water, in the 1,000-foot zone?
2. Are notices to be mailed to riparian owners of

properties on the opposite shore across the same body of water in which the island or submerged land is situate, whether or not the two shores are separated by a natural or improved navigable channel, and is the depth of such channel a determinative factor?

3. Is it necessary that the notices which are mailed to the upland owners within the 1,000-foot zone be identical in content (including time and place of proposed sale) with the published notice?

4. Is it the duty of the trustees of the internal improvement fund to prepare and mail the notices to the upland owners within the 1,000-foot zone?

The following portion of §253.12(1), F. S., as amended, is relevant to your questions:

... The trustees of the internal improvement fund may sell and convey such islands and submerged lands if not determined by the trustees to be contrary to the public interest upon such prices, terms and conditions as they see fit. After receiving application in compliance with such form as they may require to show clearly what is intended to be accomplished in any proposed development of said lands and after giving notice by publication in a newspaper published in the county in which islands or submerged lands are located not less than once a week for three consecutive weeks and mailing copies of such notice by certified or registered mail to each riparian owner of upland lying within one thousand feet of the island or submerged land proposed to be conveyed addressed to such owner as his name and address appears upon the latest county tax assessment roll, in order that any persons who have objections to the sale may have an opportunity to present the same. ..."

AS TO QUESTION 1:

Section 253.12(1), as amended, requires that notice by certified or registered mail be sent to each riparian owner of upland lying within 1,000 feet of the island or submerged lands proposed to be conveyed. The notice is to be addressed to each such owner as his name and address appears upon the latest county tax assessment roll. The statute makes no exceptions whatever to upland owners whose uplands front other bodies of water within the 1,000-foot zone. Therefore, question 1 is answered in the affirmative.

AS TO QUESTION 2:

Question 2 is answered in the affirmative. The reasoning applicable to question 1 is also applicable to question 2. The depth of the channel is not a determinative factor.

AS TO QUESTION 3:

Question 3 is answered in the affirmative. Section 253.12(1), as amended, clearly indicates that the legislature intended that the notices which are mailed in compliance with said §253.12(1), be *identical* with the notice which is published. Section 253.12(1), as amended, authorizes the trustees to sell land as defined in that section after giving notice by publication and mailing copies of *such* notice by certified or registered mail to riparian owners of upland lying within 1,000 feet of the island or submerged land proposed to

be conveyed. "Such" notice, as used in the act, appears to refer to the notice as published.

AS TO QUESTION 4:

The statute authorizes the trustees to make such sales after the trustees, among other things, have received application in compliance with such form as they may require and after giving notice by publication in the newspapers for the periods prescribed in the act and after mailing copies of such notice by certified or registered mail to each riparian owner of upland lying within 1,000 feet of the island or submerged land proposed to be sold. Nothing in the act indicates that it was the intention of the legislature that such notices be prepared and mailed by the applicants. A more orderly administration of the act can be accomplished by the trustees preparing and mailing such notices. It is my opinion that the statute imposes upon the trustees of the internal improvement fund the duty to prepare and mail the necessary copies of the notices to the upland owners within 1,000 feet of the lands which are proposed for sale.

Nothing in the act indicates that the trustees of the internal improvement fund are required to personally ascertain from the tax roll the names and addresses of riparian owners of uplands lying within 1,000 feet of the islands or submerged lands proposed for sale. The trustees of the internal improvement fund should establish the procedural requirement that all applications to purchase any lands which the trustees have authority to sell under §253.12(1), as amended, be accompanied by a list, in affidavit form, of the names and addresses of all persons to whom notices of the proposed sale are to be mailed. Furthermore, in view of the fact that the notices should be mailed by the trustees, the additional administrative burden imposed upon the trustees by this act justifies the trustees in requiring that a processing fee accompany each application. The fee could be either a flat rate to be charged for each notice which the trustees are required to mail, or the fee may be in the nature of a standard fee to be charged for the processing of all applications. The advisability of whether a fee should be charged and the amount of the fee is a policy question which I believe you should submit to the trustees of the internal improvement fund. The authority for charging the application fee and requiring the applicant to furnish a list of names to whom notices of a proposed sale should be mailed is contained in §253.12(1), F. S., as amended, which authorizes sales to be made by the trustees upon such *prices, terms and conditions* as they see fit.

057-195—July 8, 1957

CORRECTIONAL SYSTEM

**DEPARTMENT OF CORRECTIONS INDUSTRIAL TRUST
FUND—CONSTRUCTION OF §945.18, F. S. (§2, CH. 57-314)**

To: *State Auditing Department, Tallahassee*

QUESTION:

Did the legislature, by §2, Ch. 57-314, 1957, provide an industrial revolving fund, in the state treasury, of \$500,000, or such a revolving trust fund with a surplus not to exceed \$500,000?

Said Ch. 57-314 created a department of corrections industrial trust fund and made it available for the financing of the industries operated in connection with the correctional institutions of the state. This industrial trust fund, in so far as the cash account is concerned, is set up as a separate fund in the state treasury and is made the depository of all funds used for industrial purposes by the institutions under the supervision and control of the department of corrections of the board of commissioners of state institutions. This fund appears to replace the one set up under §954.51, F. S., which was expressly repealed by said Ch. 57-314.

Said §2 of Ch. 57-314 provides that "the department of corrections industrial trust fund shall consist of five hundred thousand dollars, which is hereby allotted and appropriated out of the general revenue fund, together with all assets and liabilities as of June 30, 1957, as determined by the state auditor, of all industrial operations in existence at all correctional institutions as of that date; *provided, however, that the assets and liabilities, as of June 30, 1957, shall not include cash and accounts receivable which are in excess of the current encumbered obligations as of June 30, 1957, it being the intent of the legislature that after current obligations are liquidated then the balance remaining in cash and receivables shall be deposited in the general revenue fund unallocated.* Should any general service operation of an institution be transferred to the prison industries operation by the department, all assets and liabilities of such operation shall become a part of this fund. All income, receipts, earnings and profits from such industrial enterprises shall hereafter be credited to this revolving fund to be used for the purposes herein set forth; *provided, however, that the surplus in the fund at the end of any biennium shall not exceed five hundred thousand dollars and such surplus, as determined by the state auditor to be in excess of this amount shall be deposited in the general revenue fund unallocated.*" (Emphasis supplied.) The italicized portion of the said section was added by the committee on appropriations by amendment (house journal of May 15, 1957), and the first proviso was substituted for "and all income, receipts, earnings and profits from such industrial enterprises which may be received from the sale of goods so manufactured in such enterprises."

Generally a proviso is a provision engrafted on a statute for the purpose of restraining or modifying the said statute, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible ground of misinterpretation (82 C. J. S. 882-3, §381). The proviso should be construed together with the statute to which appended, and a strict, but reasonable, construction should be given it (82 C. J. S. 885, §381). The operation of a proviso is usually confined to the statute or distinct portion thereof to which it is appended (82 C. J. S. 887, §381).

The portion of the statute to which the 1st proviso is appended provides a trust fund consisting of \$500,000 appropriated from the general revenue fund, together with all assets and liabilities of the industrial operations of the correctional institutions, however, the 1st proviso excludes from this trust fund the "cash and accounts receivable which are in excess of the current encumbered obligations as of June 30, 1957," which are to be deposited in the general revenue fund. The portion of the statute to which the 2nd proviso is appended provides that, after said June 30, 1957, "all income,

receipts, earnings and profits from such industrial enterprises shall . . . be credited to this revolving fund (set up by said Ch. 57-314) to be used for the purposes set forth" in the statute. The proviso appended to this statute limits *the surplus* in the said fund at the end of the year to not exceeding \$500,000, and any surplus in the account in excess of said \$500,000 must be transferred to and deposited in the general revenue fund of the state. The trust fund or account set up by said Ch. 57-314 consists of the assets and liabilities of the industrial operations of the correctional institutions, less "cash accounts and receivables which are in excess of the current encumbered obligations as of June 30, 1957," together with the \$500,000 appropriated from the general revenue fund by the said act. This forms the basic assets and liabilities of the trust fund. To this fund is added "all income, receipts, earnings and profits from such industrial enterprises" accruing after June 30, 1957, should be credited to the revolving fund so long as there is not accumulated a surplus in excess of \$500,000, any surplus in excess of said \$500,000, remaining at the end of a biennium, must be transferred to and deposited in the general revenue fund unallocated.

When §2 of Ch. 57-314, 1957, is read in the light of the bill as introduced, the committee amendment of said §2 in the house, §954.51, F. S., which was repealed by said Ch. 57-314, the needs necessary to set up a workable industrial trust fund for the operation of the correctional industries authorized and established by the board of commissioners of state institutions, we must conclude that §2 of said Ch. 57-314, provides for an industrial trust fund consisting of the \$500,000 appropriated to it from the general revenue fund, the assets and liabilities of the correctional industries, as defined in said §2, and a surplus, over and above such appropriation and assets and liabilities, not to exceed \$500,000. These observations seem to answer the above stated question.

057-196—July 9, 1957

STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM

MEMBERSHIP—SOCIAL SECURITY COVERAGE—CH. 650;
§§122.01, 122.04, 122.21, 122.32 AND 122.33, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Under the 2nd proviso in §122.32, F. S., as added by Ch. 57-382, 1957, are all present employees of a county, which has adopted the provisions of Ch. 650, F. S., and accepted social security benefits as therein provided, who are not members of the state and county retirement system now required to become members of division "A" of the said retirement system?

Dade county appears to be the only county in the state which has elected to come under the provisions of Ch. 650, F. S., having held an election in this connection on May 8 last. The following provision in said §122.32, as added by Ch. 57-382, to wit, "*provided, however, that the officials and employees of any county or counties which have prior to the effective date of this act (June 19, 1957) elected to accept social security under the provisions of Ch. 650, F. S., shall not be affected hereby; provided, further, all present*

and future employees of such counties shall remain in or become members of division "A" as provided in §122.01 of the state and county officers and employees retirement system." Section 122.04, F. S., provides that "the provisions of this law shall be compulsory as to all persons entering employment of the state or county of the state on or after July 1, 1947 . . ." (Emphasis supplied.) This section continued the compulsory provisions of §§121.04 and 134.04 of the prior separate state and county retirement systems. Sections 122.21 to 122.33, added by said Ch. 57-382, upon the adoption of said chapter, became component parts of Ch. 122, F. S.

The above stated question arises from language found in provisos in §122.32, F. S., by Ch. 57-382, 1957, and not by the body of the said section itself. In construing statutes we must ascertain and give effect to the legislative intent and this rule of construction applies to provisos as well as to other parts of the statute (*Therrell v. Smith*, 124 Fla. 197, 168 So. 389, text 392). A proviso should be construed together with the statute to which appended and with a view of giving effect to each part of the act and to carry out the manifest intent as evidenced by the entire act and other acts in *pari materia* (*Therrell v. Smith*, *supra*). The office of a proviso is, as a general rule, to restrain the enacting clause; to except something which would otherwise be within it (*Cragin v. Ocean and Lake Realty Co.*, 101 Fla. 1324, 133 So. 569, text 573; *Futch v. Adams*, 47 Fla. 257, 36 So. 575, text 577), or in some manner to modify it, and where it follows and restricts an enacting clause, general in its scope and language, it is to be construed strictly and limited to objects fairly within its terms (*Futch v. Adams*, *supra*. To the same effect see also 82 C. J. S. 882-889, §381). We find nothing in the title to said Ch. 57-382 indicating any intention or desire on the part of the legislature to, by said chapter, change or modify the compulsory provisions of said §122.04, F. S. To construe the said provisos as changing said §122.04, F. S., as to one or more counties would also seem to bring up a serious question of local legislation without any compliance with §21, Art. III, State Const.

When §122.32, F. S., and the provisos therein, are read in connection with §§122.01 to 122.31, and §§122.21 to 122.33, as amended by said Ch. 57-382, we feel that the phrase "provided, further, all present and future employees of such counties shall remain in or become members of division "A" as provided in §122.01 of the state and county officers and employees retirement system," has reference to those officers and employees now within the state and county officers and employees retirement system or who hereafter become members of said system, which special reference to compulsory members under §122.04, F. S., and who do not elect to come under the provisions of division "B" of the said system. Should there be any employees whose services antedate July 1, 1947, and who have not elected to become members of the said retirement system and who are not within the purview of the compulsory provisions of §122.04, they are not, by reason of the provisos mentioned in the above question, now required to become members of either division of the system. New §122.32, and the provisos therein, have not changed the requirements of §122.04, F. S. With these qualifications the above question is answered in the negative.

057-197—July 9, 1957

TAXATION

LICENSES AND LICENSE TAXES—TRADING STAMP REDEMPTION STORES—NUMBERS, ETC.—CH. 205, §§205.01, 205.02, 205.49, 205.52, 205.53 AND 205.59, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a trading stamp company, issuing trading stamps in this state through retailers, maintains two or more redemption stores in a single county, are they required to obtain separate licenses for each such store maintained?

License taxes upon occupations, professions and businesses are imposed by the legislature, pursuant to section 5, article IX, of the state constitution. Specific licenses and license taxes were required of merchants using trading stamps (section 928, Revised General Statutes, 1920) and trading stamp firms (section 988, Revised General Statutes, 1920) prior to the enactment of chapter 18011, laws of Florida, acts of 1937, section 38 of which expressly repealed said sections 928 and 988. An examination of chapters 14491 and 18011, laws of Florida, acts of 1929 and 1937, shows a design on the part of the legislature to reduce the number of specific classifications for license and license tax purposes and to adopt general classifications, many of which are inclusive of two or more of the previous specific classifications. Sections 205.49, 205.52, 205.53, 205.59, and other sections may be cited as examples of such general classifications.

Under section 205.01, Florida Statutes, licenses for the operation of professions, occupations and businesses are required to obtain an occupational license "from the tax collector of the county where the place of business may be located or where the profession or occupation may be engaged in . . ." County and city license taxes are "imposed upon every business, profession or occupation . . ." (section 205.02). Where a business is transferred there is provision for the transfer of the license "but such transferred license shall not be held good for . . . any other place than that for which it was originally issued . . ." (section 205.03). A licensee is required to keep the license issued to him "displayed conspicuously at their place of business in such manner as to be open to the view of the public and subject to inspection . . ." (section 205.07). How can a single license be displayed in two separate places of business so as to comply with this section? It has been held that a license to operate a place of business does not authorize the licensee to conduct more than one place of business in different localities (*American Locker Company v. Long Beach*, Cal. App., 170 P. 2d 1005; *Brown v. State*, 177 Md. 321, 9 A. 2d 321), and a license to conduct a business at one place does not authorize the licensee to pursue such business in another locality (*Blan v. Hollywood Realty Company*, 22 Ala. App. 537, 118 So. 253, certiorari denied 218 Ala. 2, 118 So. 258).

We feel that chapter 205, Florida Statutes, except where otherwise provided, contemplates the operation of a single business under one license and that two places of business, or a place of business and a branch business, may not be maintained under

a single license. Answering the above stated question the trading stamp company mentioned is required to obtain a separate license and pay a separate license tax for each of its redemption stores under the applicable license statute.

057-198—July 9, 1957

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—LEASES OF TANGIBLE PERSONAL PROPERTY—CH. 199, §§192.03, 199.01 AND 200.01, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the interests of parties to a lease of tangible personal property, or of either of them, intangible personal property subject to taxation under Ch. 199, F. S.?

Specifically we have before us an equipment lease by which the owner of certain equipment and machinery leases to a lessee one or more items of such equipment and machinery for a consideration of a fixed amount upon delivery of the said equipment or machinery to the lessee and a monthly payment of a fixed amount until the termination of the said lease. There is included in the lease an option to purchase the leased equipment or machinery at and for a fixed consideration upon written notice as specified in the said lease. On the creation of an ordinary bailment, the general property remains in the bailor, and the bailee acquires a special interest for the express or implied objects of the bailment (6 Am. Jur. 239, §88). The decided weight of authority supports the proposition that every bailee has a temporary qualified property in the things the possession of which is delivered to him (6 Am. Jur. 243, §93). "One who lets the use of a chattel for a reward is a bailor for hire" (6 Am. Jur. 184, §19). "The word 'lease,' when applied to personal property, has been held properly to result in the relation of bailor and bailee; and . . . various transactions called leases have been held to be bailments (8 C. J. S. 226, §2).

"The terms or phrases 'choses in action' and 'debts' are used by courts to represent the same thing when viewed from opposite sides. The chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay. Choses in action are personal property . . ." (42 Am. Jur. 207, §26). "The general rule is that solvent credits such as bills, notes and other obligations to pay money comes within the category of property which may be subjected to taxation by the legislative body" (51 Am. Jur. 445, §425). "An 'obligation to pay money,' within the meaning of tax enactments, usually refers to a direct written promise to pay a stated sum, and not to the duty to pay, which may be established by proof of extrinsic facts" (51 Am. Jur. 446, §425).

Under §192.03, F. S., "for the purpose of taxation 'personal property' shall be construed to include all goods and chattels, money and effects, boats and vessels, *debts due or to become due from solvent debtors whether on account, contract, note or otherwise*, and all public stocks or shares in incorporated or unincor-

porated companies." Such personal property is divided for purposes of taxation into intangible personal property (Ch. 199, F. S.) and tangible personal property (Ch. 200, F. S.). In the light of said §192.03 and §§199.01 and 200.01, F. S., that the obligation to pay rent for the use of the leased property, by the lessee (the debtor) to the lessor (the creditor), is a chose in action and an intangible subject to taxation under Ch. 199, F. S. "There is authority to the effect that a rental contract constitutes 'an account receivable' or 'credit' within the meaning of statutes taxing intangibles of that character (84 C. J. S. 196, §79, note 21).

It has been stated that "rents in arrears is a chose in action taxable as a credit, but rent to become due is not taxable as a credit" (84 C. J. S. 196, §79, note 20). This rule may find support in *DeVore v. Lee*, 158 Fla. 608, 30 So. 2d 924, text 925, which involved the valuation of a lease on real property for purposes of intangible personal property taxes. The above stated question is, therefore, answered in the affirmative, subject to the above stated rule for fixing the value of the chose in action.

057-200—July 16, 1957

EXECUTIVE DEPARTMENT

COMPTROLLER—STATE WARRANTS, CANCELLATION, RE-ISSUANCE—APPLICATION OF STATUTES OF LIMITATIONS—§§17.26 AND 95.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the payment of state warrants barred by the limitations imposed by §95.11, F. S., and if so may they, when so barred, be reissued under §17.26, F. S.?

Section 95.11, F. S., provides that "actions, other than those for the recovery of real property, can only be commenced," within the time or times mentioned in said §95.11. The limitations imposed by said §95.11 range from a one-year statute on certain penalties and forfeitures to a 20-year statute on instruments in writing under seal. If this section is applicable to outstanding state warrants, the five-year limitation is probably the applicable statute.

In *State v. Green*, Fla., 88 So. 2d 493, there was involved the right of a person to a refund of taxes paid when no tax was due, under §215.26, F. S., and a proceeding in mandamus was brought to require the state comptroller to issue a state warrant in repayment of the said overpayment. It was contended that the one-year limitation contained in said §215.26 barred the payment of the said claim. In this connection the court said that "it is settled law in this state that mandamus is generally controlled by the equitable doctrine of laches rather than the statutes of limitations" The court directed the issuance of a warrant in repayment of the said overpayment.

In *State v. Lee*, 142 Fla. 154, 194 So. 315, one L. A. Perkins, for whom the statutes provided a salary of \$250 per month, was, during the time from July 1, 1933 to Aug. 31, 1935, paid only the sum of \$200 per month, leaving an unpaid balance of \$1,300 under the statute. On Nov. 15, 1939, Perkins made application to the state comptroller for the payment of his back salary, which

was denied, whereupon a mandamus proceeding was brought to enforce payment. The state contended that the three-year statute, which related to actions upon liabilities created by statute, was applicable and that the claim for back salary was barred by the said statute. The court remarked that "the claim for salary fixed by statute and due a state officer or employee under the statute is enforceable by mandamus, without first resorting to an action to determine the enforceability of the claim, whereas the actions referred to in the quoted statute embraces those liabilities created by statute where the claim must first be reduced to judgment before they may be enforced."

Section 17.26, F. S., fixed a limitation within which state warrants must be presented for payment and when not presented for payment within the stated time the warrant is cancelled by statute; however, the person entitled to the warrant so cancelled may on demand have the same reissued by the state comptroller, and make an appropriation for the payment of the warrant as reissued. There is no indication in this statute of a legislative design to apply to the reissuance of such warrants any statute of limitations.

The above stated question is answered in the negative; there is in the present statutes no limitation upon the reissuance of warrants pursuant to §17.26, F. S.

057-201—July 16, 1957

MOTOR VEHICLES—REGULATION OF TRAFFIC ON HIGHWAYS

AUTHORIZED EMERGENCY VEHICLES—VEHICLE OF JUSTICE OF PEACE USED IN PERFORMANCE OF DUTY—

CH. 317, §§317.01, 936.01 AND 936.03, F. S.

To: *J. C. Beard, Justice of Peace, Daytona Beach*

QUESTIONS:

1. When a justice of the peace, while acting as conservator of the peace, uses his automobile to respond to an emergency call, does such automobile come within the definition of "authorized emergency vehicle" found in §317.01, F. S., so as to entitle him to the "authorized emergency vehicle" privileges of Ch. 317, F. S.?

2. When a justice of the peace, while acting as coroner, uses his automobile to respond to an emergency call, does such automobile come within the definition of "authorized emergency vehicle" found in §317.01, F. S., so as to entitle him to the "authorized emergency vehicle" privileges of Ch. 317, F. S.?

AS TO QUESTION 1:

Chapter 317, F. S., relating to the regulation of traffic on highways, confers certain privileges and exemptions upon the driver of an "authorized emergency vehicle" when responding to an emergency call, and §317.01 defines "authorized emergency vehicle" as follows:

AUTHORIZED EMERGENCY VEHICLE.—Vehicles of the fire department (fire patrol), police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations as are desig-

nated or authorized by the director of the department of public safety or the chief of police of an incorporated city.

Even though a justice of the peace, being a judicial officer, is a conservator of the peace (§901.01, F. S.), I find nothing in the foregoing definition which appears to entitle him to the "authorized emergency vehicle" privileges of Ch. 317. Your letter suggests that when he is responding to an emergency call as conservator of the peace his motor vehicle would be a "police vehicle" within the meaning of said definition but I do not think that such is the case. I do not believe that the legislature intended that the term "police vehicles," as used in the foregoing definition of "authorized emergency vehicle," should be applicable to the vehicle of a justice of the peace, even though he is responding to an emergency call as a conservator of the peace. Therefore, in my opinion your 1st question is properly answered in the negative.

AS TO QUESTION 2:

Under the law of Florida, "Justices of the peace within their respective districts shall hold inquests of the dead when so directed as provided in §936.03, and to that extent shall be deemed coroners." (Emphasis supplied.) (§936.01, F. S.). I find no statute which confers upon a justice of the peace, while acting as coroner, any common law power of a coroner except to hold inquests. So, in Florida a coroner is not a police officer or law enforcement officer, and his vehicle is not a "police vehicle" and does not come within the foregoing definition of "authorized emergency vehicle" even when he is responding to an emergency call. Therefore, in my opinion your 2nd question is properly answered in the negative.

057-202—July 16, 1957

TAXATION

LEVY OF SPECIAL ROAD AND BRIDGE DISTRICT TAXES AGAINST HOMESTEADS—§7, ART. X, STATE CONST.

To: Board of County Commissioners, Bradenton

QUESTIONS:

1. May a taxpayer, by mandamus or other proper procedure, require the levy and assessment of ad valorem taxes against properties subject to such taxes but against which such taxes have not been levied?
2. May ad valorem taxes be levied against homestead property, within the purview of §7, Art. X, State Const., for the maintenance, upkeep and repair of roads of special road and bridge districts?

The 1st question seems to have been answered in the affirmative by State ex rel Ginsberg v. Dreka, 135 Fla. 463, 185 So. 616, where on application, by a resident and taxpayer of two special road and bridge districts and of a hospital district, for original proceeding in mandamus in the supreme court, the court permitted the maintenance of such mandamus by a resident and taxpayer. In this case the supreme court seems to have upheld the right of a resident and taxpayer of said road, bridge and hospital districts to proceed by mandamus to require the levy

of an ad valorem tax upon property which had not been so taxed, although subject to such tax. To the same effect see also 35 Am. Jur. 73, §320; 55 C. J. S. 47 and 351, §§47 and 182; *State v. Lehman*, 100 Fla. 1401, 131 So. 333, *Vans Agnew v. Johnson*, 112 Fla. 7, 150 So. 111. These observations and authorities seem to answer the 1st question in the affirmative.

In the 1st question we have assumed the obligation of the public officers to levy and assess the tax in question; however, the 2nd question raises the question of the application of the tax mentioned to homesteads under §7, Art. X, State Const. In the above case of *State ex rel Ginsberg v. Dreka*, *Ginsberg* was a citizen and taxpayer of two special road and bridge districts and of a hospital district established prior to the adoption of the homestead amendment to the state constitution in 1934. It was admitted in this case that the districts were "special assessment districts, and that the improvements made therein, for which the special assessments are to be levied, were made for the benefit of the entire district and that all homesteads therein were required to pay for said improvements by taxation." This case arose and was decided under the homestead tax exemption amendment adopted in 1934, which amendment was further amended in 1938. The said 1934 amendment exempted homesteads from taxation "other than special assessments for benefits . . ." The court remarked that the taxes levied by the districts were benefits to the special assessment districts and that "benefits to a special assessment district do not cease the minute of their creation." In this case the court remarked that "if taxes can be imposed on homesteads to make improvements for *the benefit of the district or districts*, we think it must necessarily follow that any and all legitimate expenses of supporting and maintaining these improvements must also be paid by assessments on homestead and non-homestead property alike." In this case the court seems to have considered the phrase "special assessments for benefits," to have reference to benefits of the district and no mention is made of special benefits to the lands assessed. This leads to a study of the 1938 homestead tax exemption amendment as compared with the 1934 amendment.

Whether the conversion of the 1934 phrase "special assessments for benefits," into the 1938 "assessments for special benefits" signifies any change in meaning is not clear. Attorney General Gibbs thought that no difference resulted (1939-40 B. R. 438, text 447), Mr. Justice Buford, with whom Mr. Justice Terrell concurred, argued the contrary view in his dissent in *State v. Henderson*, 137 Fla. 666, 188 So. 351, text 355, but Mr. Justice Whitfield, writing for the majority in the *State v. Henderson* case, preferred to leave the question undecided. In *State v. Henderson*, which appears to have been decided after the adoption of the 1938 amendment, the court held that special tax school district levies were not assessments for special benefits. In *Whisnant v. Stringfellow*, Fla., 50 So. 2d 885, it was held that assessments for the maintenance of county health were not "assessments for special benefits." In *Fort Lauderdale v. Carter*, Fla., 71 So. 2d 260, assessments to be used to defray the expenses of garbage, waste and trash collection were held not to be assessments for special benefits. "An assessment for special benefits must be 'ac-

cording to' or must have a 'relation to' or some 'reference to' the special benefit resulting to the particular property assessed in order to bring it within the exceptions to the homestead exemption prescribed by article X, section 7, of the Florida Constitution."

In *Crowder v. Phillips*, 146 Fla. 428 (not in Southern Reporter) it was observed that "assessments for special benefits" or special assessments, are peculiar to the premises benefited by some local improvement, such as paving, draining, or grading. They are direct, proximate and reasonably certain of computation and must add something to the use or sale value of the premises benefited above the ordinary value.

In *Fisher v. Board of County Commissioners, Fla.*, 84 So. 2d 572, text 579, it is said that "an 'assessment for special benefits' on the other hand is customarily a fixed amount assessed against a particular parcel of land arrived at by totaling the cost of a public improvement and apportioning it against abutting property specially benefited, usually on a front foot or acreage basis, without regard to ad valorem valuation of the land From the cases cited the principle is clear that the framers of the constitutional exemption and the people who approved it manifestly intended that an imposition based on assessed valuation, whether for local improvement or general government, if one from which homesteads are exempt, while an assessment bearing a logical relation to direct 'special benefits' is one to which homesteads may be subjected"

The above authorities and observations tend to indicate that there may be a distinction between the "special assessments for benefits" of the 1934 homestead tax exemption amendment, under which *State ex rel Ginsberg v. Dreka*, 135 Fla. 463, 185 So. 616, was decided, and the "assessments for special benefits" of the current homestead tax exemption amendment. We are therefore doubtful that the ad valorem taxes of special road and bridge districts, hospital districts, and similar districts, may be levied against homesteads unless such assessments are required under the contracts under which outstanding bonds or other obligations were issued or incurred.

The 2nd above question is answered in the negative unless required by an existing contract, such as is protected by the contract clause of the federal constitution in force when the constitutional amendment was adopted.

057-203—July 16, 1957

MOTOR VEHICLES

HIGHWAY PATROL—AUXILIARY, ADMINISTRATION OF
§321.24, F. S. (CH. 57-96) BY DIRECTOR

To: *H. N. Kirkman, Department of Public Safety, Tallahassee*
QUESTIONS:

1. Since the director of the Florida highway patrol is authorized to establish an auxiliary of the Florida highway patrol, with certain qualifications to members, would this establishment, since it was by legislative act, make this auxiliary a state sub-agency of the Florida highway patrol?

2. If the Florida highway patrol auxiliary—Leon

county group—were to purchase a bus from their own funds, said bus to be reconverted for use as an emergency rescue vehicle by the auxiliary, and said bus was registered in the name of the Florida highway patrol auxiliary—Leon county group, would the ownership technically be of the department of public safety, division of the Florida highway patrol or would it actually be that of the FHPA—Leon county group?

3. Should this bus be involved in a collision in which civil liability was in question, who would technically be held at fault—the FHPA—Leon county group—or the Florida highway patrol, since the patrol is the agency which is authorized to establish the group to whom the vehicle is registered?

4. In the purchasing of tags (registration) for the above bus, may the auxiliary purchase same on state vehicle rates or would the auxiliary be required to purchase on a commercial basis?

AS TO QUESTION 1:

All boards, commissions and departments created by legislative act charged with the administration of state affairs, and the exercise of sovereign functions, are component governmental agencies of the state. In the particular instance the statute authorizes the director of public safety to establish an auxiliary agency within a preexisting division of the department of public safety, to facilitate the administration of the public affairs of the department, under the direction and control of an existing agency. Such an auxiliary may be termed a subordinate agency of the division of the Florida highway patrol, created to facilitate the department of public safety in the administration of the public affairs of the department. Being created, or authorized, by legislative authority it is a state agency, vested with the duty of exercising, within the scope of its delegated authority, some of the powers of state sovereignty. Consequently it is a subordinate agency of the department of public safety, and particularly of the division of Florida highway patrol.

AS TO QUESTION 2:

It is understood that the plan of organization of the auxiliary contemplates the creation of separate groups of the members of the auxiliary composed of the members recruited from residents of the several counties of the state to be designated and identified by the name of the county from which they are chosen. A motor vehicle purchased by a particular county group, or otherwise acquired, in the name of the auxiliary and the designated group, for use in the furtherance of the objectives of the auxiliary would be considered the property of the auxiliary, the presumption of law being that it was acquired by the group for the use and benefit of the agency. It could not be used by the group except under the complete and exclusive control and direction of the highway patrol, which would be inconsistent with ownership by the group as individuals, disassociated from their membership as auxiliary men.

AS TO QUESTION 3:

In the event of a casualty from which liability for injury

to persons or damage to property should result, the responsibility would be imposed upon the state agency if such damage or injury was the result of the use of the vehicle for the purpose of discharging the duties of the auxiliary, subject, however, to the immunity of the state or its agencies to suit in tort.

AS TO QUESTION 4:

It is understood that the use of the vehicle will be confined to the purposes of the highway patrol auxiliary, under the control and direction of the division of highway patrol, of the department, in which event registration tag may be issued under series "x," applicable to state owned and operated vehicles.

057-204—July 17, 1957

SOCIAL SECURITY FOR PUBLIC EMPLOYEES

OASI—STATUS OF VARIOUS GOVERNMENTAL AGENCIES,
POLITICAL SUBDIVISIONS—§§650.02(6) AND
1.01(10), F. S.

To: *Herbert W. Miller, Assistant Director OASI, Tallahassee*

QUESTION:

Are the following political subdivisions for OASI purposes?

1. East Beach water control district.
2. Indian River farms drainage district.
3. Melbourne-Tillman drainage district.
4. Shawano drainage district (Belle Glade).
5. Sugarland drainage district (Clewiston).
6. Zellwood drainage and water control district, (Ch. 20715, 1941).
7. East Duval county mosquito control district, (Ch. 390, F. S.).
8. Fort Myers mosquito control district.
9. Naples mosquito control district (Ch. 390, F. S.).
10. Gulf mosquito control district (Ch. 390, F. S.).
11. Hernando county park and recreation center, (S. B. 765, X of 1945).
12. Florida inland navigation district (East Coast canal).
13. Okeechobee county welfare board (Ch. 27789).
14. Santa Rosa island authority.
15. Ship Canal authority (Ch. 16176, 1933).
16. Florida Ship Canal navigation district (Ch. 17023, 1935).
17. Frederick Eugene Lykes, Jr., memorial county library.

In my opinions, 057-58, dated March 4, 1957, and 056-351, dated Dec. 19, 1956, we dealt with the same question in relation to county school boards, the state universities and junior colleges.

Political subdivision is defined in §650.02(6), F. S., as follows:

The term "political subdivision" includes an instrumentality of the state, or of one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision;

It is also defined in 42 U. S. code annotated, §418 as follows:

(2) The term "political subdivision" includes an instrumentality of (A) a State, (B) one or more political subdivisions of a State, or (C) a State and one or more of its political subdivisions.

It therefore appears that the primary determining point is whether the agency is under a governing body that is independent and self-controlling, especially as to management, funds and employees, which for reasons set forth in opinions 056-551 and 057-58 may be considered a political subdivision for OASI purposes.

Many of the agencies dealt with herein represent districts, and the general law relating to and defining "political subdivisions" provides as follows:

Section 1.01(10)—The words "public body," "body politic" or "political subdivision" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts and all other districts in this state.

Some of the agencies named herein are drainage districts and the general law relating to such districts is set forth in Ch. 298, F. S. Analysis of such chapter will demonstrate that such drainage districts are governed by a duly elected board of supervisors. Such board is charged with the management and employment of necessary help, the receipt and disbursement of moneys in connection therewith, and other responsibilities incidental to constituting said district as a juristic entity.

With respect to each agency dealt with herein we have endeavored to locate and consider quite a number of local bills pertaining thereto.

The following shows the manner in which each was created and controlled or by whom operated:

1. *East Beach water control district* lies in Palm Beach county and was created by Ch. 22877, 1945, as amended by Ch. 25347, 1949. Said district is governed by an elected board of supervisors and is considered a political subdivision for OASI purposes.

2. *Indian River farms drainage district* lies in Indian River county and was created by Ch. 8882, 1921. See also Ch. 10693, 1925 and Ch. 12057, 1927. Said district is governed by an elected board of supervisors and is considered a political subdivision for OASI purposes.

3. *Melbourne-Tillman drainage district* lies in Brevard county and was created by Ch. 9999, 1923. See also Ch. 21024, 1941. Said district is governed by an elected board of supervisors and is considered a political subdivision for OASI purposes.

4. *Shawano drainage district* lies in Palm Beach county and was created by Ch. 24254, 1947. Said district is governed by a board of supervisors and is considered a political subdivision for OASI purposes.

5. *Sugarland drainage district* lies in Hendry county and was created by Ch. 18287. See also Ch. 11136, 1925. Said district is governed by a board of supervisors and is considered a political subdivision for OASI purposes.

6. *Zellwood drainage and water control district* lies in Orange county and was created by Ch. 20715, 1941. Said district is governed by a board of supervisors and §2 of said act declares said

district to be a political subdivision.

7. *East Duval County Mosquito District* lies in Duval county. We do not find any specific legislation creating said district; therefore, it is assumed that same was created under either Ch. 389 or 390, F. S. You state in your letter that your records indicate that said district was created under Ch. 390, F. S. Such chapter provides for an alternate system of creating mosquito control districts whereby 15% of the resident freeholders of the proposed district petition for the creation of a mosquito control district. The district is governed by a board of commissioners duly elected according to §§390.07-390.10. Such district is considered a political subdivision for OASI purposes.

8. *Fort Myers mosquito control district* lies in Lee county and in the absence of specific legislation creating the district, it is assumed that same was created under either Ch. 389 or 390, F. S. So created, it may be considered a political subdivision for OASI purposes.

9. *Naples mosquito control district* lies in Collier county and according to your letter was created under Ch. 390, F. S. In the absence of any specific legislation on the matter, such district may be considered a political subdivision for OASI purposes.

10. *Gulf mosquito control district* according to your records was created under Ch. 390 and may be considered a political subdivision for OASI purposes.

11. *Hernando county park and recreation center* lies in Hernando county and was created by Ch. 23320 and 23323, 1945. The center is governed by a board of trustees appointed by the board of county commissioners. The county, subject to the approval of the board of county commissioners, vests the authority or power to maintain and conduct parks, playgrounds and recreational facilities in the trustees. In view of the nature of the creation of such a center, I do not believe it is sufficiently independent of the county governing authority, the board of county commissioners, to be considered a political subdivision.

12. *Florida Inland navigation district* was created by Ch. 14723, 1931. See also Ch. 19122, 1939; Ch. 20430-21409, 1941 and Ch. 27275, 1951. For OASI purposes this district may be considered a political subdivision.

13. *Okeechobee county welfare board* was created by Ch. 27783, 1951. The members of said board are appointed by the governor according to law. Such board may be considered a political subdivision for OASI purposes.

14. *Santa Rosa island authority* was created by Ch. 24500, 1947. The governing authority is a board appointed by the board of county commissioners of Escambia county, and may be removed by said commission. Such power as the authority has is delegated to it by the county subject to said Ch. 24500. It is doubtful that the Santa Rosa island authority may be considered a political subdivision for OASI purposes.

15. *Ship Canal authority* was created by Ch. 16176, 1933, and the management of same is invested in a board of directors appointed by the governor. Such authority may be considered a political subdivision for OASI purposes.

16. *Florida Ship Canal navigation district* was created by Ch. 17023, 1935. The governing body of said district is a board of commissioners. The act does provide that members of the board of

directors of the Ship Canal authority shall be ex officio members of the board and does not provide for any other person to be appointed to the board. The records of the secretary of state's office do not reveal that any others were appointed, but that the same persons are in fact the governing authority of both the Florida Ship Canal navigation district and the Ship Canal authority. However, the Florida Ship Canal navigation authority appears to meet the requirements to be classed as a political subdivision for OASI purposes.

17. *Frederick Eugene Lykes, Jr., memorial county library.* We do not find any specific legislation on this and do not know its whereabouts or how created. Therefore, unless you furnish us with additional information we are unable to answer your question relating to it.

I believe the foregoing answers the remainder of the questions.

057-205—July 19, 1957

TAXATION

TAXATION OF PIERS AND BUILDINGS ON NAVIGABLE WATERS—§1, ART. IX, AND §16, ART. XVI, STATE CONST.; §192.61, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are piers and buildings on lands covered by navigable waters, which are claimed, occupied and used by persons, firms or corporations, other than some governmental agency, and which piers or buildings are not claimed by the state, subject to ad valorem taxation?

It is our information that the building or buildings, and the pier upon which they have been constructed, specifically involved in this case, are located in the Halifax river, a navigable stream, below the average high water mark of the said river. It is our impression that the Halifax river, at the place where the pier and buildings are located, is tidal water. The lands upon which said buildings or piers are located, so far as we are advised, are submerged sovereignty lands under navigable waters. The persons using the said buildings and pier, evidently for purposes of a yacht club, are presumed to have claimed some right of ingress or egress to said property probably under some riparian right. So far as we are advised the claimant of said pier or buildings claim or own no abutting land adjacent to said pier and buildings but may have or claim some riparian rights, such as ingress and egress, to the pier and buildings.

The pier and buildings in question are property either of the yacht club using it, or of some other person, firm or corporation, or of the state; however, we gather from the file that the property is claimed by the yacht club using it. No claim of tax exemption appears to have been made on the grounds that the said property is held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, or §16, Art. XVI, State Const., so as to be exempt under §192.06, F. S. We further presume that the pier was constructed pursuant to the applicable permit requirements of the state and the federal government. We are not advised of

the state making any claim to the property because of its location upon sovereignty lands. (*Williams v. Guthrie*, 102 Fla. 1047; 137 So. 682).

In *Carnasion v. Paul*, Fla., 53 So. 2d 304, a pier had been constructed on the ocean side of Volusia county below the high water mark of the Atlantic ocean, which, although connected with the upland, was dependent for ingress and egress upon a reservation of riparian rights contained in a conveyance of the abutting uplands. In this case the pier was held subject to taxation by Volusia county. There appears little, if any, distinction between the pier in the *Carnasion* case and this case.

In the light of the *Carnasion* case and §192.61, F. S., which provides that riparian rights are not to be assessed or extended upon the tax roll for purposes of taxation, etc., we are of the opinion that the pier and buildings on lands covered by navigable waters owned or claimed by persons, firms or corporations are not entitled to tax exemption but are subject to taxation notwithstanding the public ownership of the lands upon which they may be located. These properties should be assessed at their full cash value as other properties are assessed so long as they are not taken over and administered by the state or one of its agencies under the rule of *Williams v. Guthrie*, supra.

057-206—July 19, 1957

TAXATION

ASSESSMENTS FOR SPECIAL BENEFITS—SUCCESSIVE WORKS OF IMPROVEMENT

To: *Harry T. Newett, City Attorney, Delray Beach*

QUESTION:

When assessing real property for special benefits derived from successive works of improvement, may assessments be made where existing improvement works have been replaced or extended by new works?

The above question arises because of the overlapping of an existing and a new improvement district or area, or two existing districts, in connection with street, drain and sewer improvements in the respective districts. We gather from the file that certain drains, streets and sewers have heretofore been constructed in either or both districts or in one of such districts and that by reason of plans of further or new improvement works it becomes necessary to replace, reconstruct or improve existing works, by either or both of said districts or areas, in some instances by the district making the prior improvements and in others by the other district. Pursuant to the plan for additional or improved works existing streets, sewers or drains may, and in some instances will have to, be replaced, enlarged or altered in accordance with the plans of replacement, enlargement and alteration. In one or more instances presently good and adequate sidewalks will have to be replaced due to the raising or lowering of grades, the widening of streets, and otherwise; and the same rule will doubtless apply to sewers and drains.

"A 'special assessment' is like a tax in that it is an enforced contribution from the property owner But it is inherently different and governed by entirely different principles. It is im-

posed upon the theory that the portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefited, it is not governed by uniformity, and may be determined legislatively or judicially" (*City of Orlando v. State*, Fla., 67 So. 2d 673, text 674-5). Special assessments must be supported by commensurate benefits (*Rafkin v. Miami Beach*, Fla., 38 So. 2d 836) and where there are no benefits arising from the local improvements, special assessments in relation to such improvements are void (*Rosche v. Hollywood*, Fla., 55 So. 2d 909). They are justifiable only on the basis of the benefits accruing to the property (*Summerland, Inc. v. Punta Gorda*, 101 Fla. 543, 134 So. 611). These benefits special to the property benefited are not to be confused with those unapportioned benefits, common and general to all property in the district or area improved. In this connection, see also *Atlantic Coast Line Railroad Co. v. Lakeland*, 94 Fla. 347, 115 So. 669; *Fort Myers v. State*, 97 Fla. 704, 117 So. 97; *Utley v. St. Petersburg*, 106 Fla. 692, 144 So. 53.

"A municipal corporation is without inherent power to levy special assessments, and, in order that such assessments be enforced, they must be made pursuant to legislative authority and the method prescribed must be substantially followed" (*Hollywood v. Davis*, 154 Fla. 785, 19 So. 2d 111, text 114; see also *Miami Beach v. Tenney*, 150 Fla. 241, 7 So. 2d 136, text 141; *Simpson v. Brooksville*, 137 Fla. 623, 188 So. 794, text 795; and *Coral Gables v. Coral Gables, Inc.*, 119 Fla. 30, 160 So. 476, text 478). There is no express provision in the Florida constitution as to special assessments for local improvements (*Everglades Sugar and Land Co. v. Bryan*, 81 Fla. 75, 87 So. 68, text 76). A municipal corporation *may be authorized* to levy special assessments for the cost of reconstructing sidewalks or curbs, even though an assessment was made for their original construction (63 C. J. S. 1056, §1313) and assessments may be made for additional sewers, despite the fact that the property is already served by existing sewers if, and only if, there have been additional benefits conferred (63 C. J. S. 1136, §1374).

In the light of the above authorities unless there be an act of the legislature or a statute providing for benefits derived from repair of streets, sewers or drains, or for the replacement thereof, or for the repair or replacement of sidewalks, after an assessment has been made according to law for the benefits derived from the original construction or improvement we do not think that special assessments may be made (*Hamilton, Law of Special Assessments*, p. 596, §618; 48 Am. Jur. 601-603, §§45 and 46; *Golden v. Philadelphia*, 162 Pa. Super. 247, 57 A. 2d 429).

We, therefore, feel that the above stated question may be answered in the affirmative only where there is some act or statute making express provision for the assessment. We doubt that an act or statute providing for assessment of benefits derived from an original improvement would authorize assessments for replacements, enlargements or alterations.

057-207—July 19, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM**

CREDIT FOR TIME EMPLOYED BY NONPROFIT CORPORATION BUT PAID WITH FUNDS DONATED BY COUNTY

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May present members of the state and county officers and employees retirement system receive credit for the time they were employed by a nonprofit corporation but paid from funds donated or furnished said corporation by the county welfare board?

Certain present members of the state and county officers and employees retirement system were, from March 1, 1948 to Sept. 30, 1950, employed by the child guidance clinic, a nonprofit corporation of Pinellas county, but were paid by said corporation from funds donated, supplied or appropriated to the said corporation by the juvenile welfare board of Pinellas county, which appears to be an agency of the county set up by Ch. 23483, 1945, as amended, and whose funds appear to be derived from county taxation (see §3 of said act). The juvenile welfare board of Pinellas county has, since its establishment in 1945, been authorized to "allocate and provide funds for other agencies in the county which are operated for the benefit of juveniles" It seems evident that the above mentioned child guidance clinic was held to be such an agency, and funds, derived from county taxation for juvenile welfare purposes, were allocated and provided to it to be used for juvenile welfare purposes.

The said child guidance clinic, being a nonprofit corporation organized and established under the statutes of this state providing for the organization and establishment of nonprofit corporations, was and is not an "agency, branch, department, institution or board of the state, or any county of the state," and the funds from which the employees of the said child guidance clinic were paid, being neither state nor county funds, although allocated and provided by the juvenile welfare board from county funds, but corporate funds, such employees of the said corporation were not, neither are they now, within the purview of the state and county officers and employees retirement system (Ch. 122, F. S.) nor were they within the former state officers and employees retirement system (Ch. 121, F. S.) or the county officers and employees retirement system (Ch. 134, F. S.).

The above stated question should be answered in the negative upon the record now before us.

057-208—July 19, 1957

STATE PURCHASING AND PRINTING

**APPLICATION OF CHS. 283 AND 287, F. S. TO PURCHASES,
INCLUDING PRINTING, MADE BY JACKSONVILLE
EXPRESSWAY AUTHORITY**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the provisions of Ch. 283, and Ch. 287, F. S., in-

cluding Ch. 57-171, acts of 1957, which supersedes said Ch. 287, applicable to purchases made, including printing, by the Jacksonville expressway authority?

Chapter 283, F. S., relates to and regulates the public printing of the state. Under §283.01, "all public printing of the state shall be let upon contract to the lowest responsible bidder. . . ." (Emphasis supplied.) Section 283.04 divides state printing into two classes—class "A" and class "B" printing. If Ch. 283 is applicable to the printing for the Jacksonville expressway authority, such printing would be class "B" printing. Under §283.10, "no general contract may be let to cover the printing designated as class 'B,' but each job coming under this classification shall be let separately, by the department to which it belongs, to the lowest responsible bidder who shall manufacture the same within the state" The department of the state government calling for such bids on printing "shall call for bids from two or more printing houses within the state upon each separate job of printing." (§283.10). These observations raise the question of whether printing for the Jacksonville expressway authority is printing for an agency or department of the state.

Chapter 287, F. S., established the "state purchasing council," which chapter was revised and superseded by Ch. 57-171, 1957, and the name of the agency or department changed to the "state purchasing commission." The provisions of said Ch. 287 and Ch. 57-171 are substantially the same, so that reference to the state purchasing commission and to the provisions of said Ch. 57-171 may be taken and understood as references to the state purchasing council and Ch. 287. Under §6, of said Ch. 57-171, (as well as under §287.06) the commission or council is required to adopt purchasing regulations "governing the purchase by any agency of any commodity or commodities" (Emphasis supplied.) The term "commodity" or "commodities" means and includes "the various commodities, goods, merchandise, equipment and other personal property purchased by agencies of the state of Florida," but does not include public printing, which is regulated by Ch. 283, F. S. (see §1(2), Ch. 57-171 and §287.01(2), F. S.). Under §8, Ch. 57-171 (and §287.08, F. S.) "no purchase shall be made where the purchase price thereof is in excess of one thousand dollars unless made upon competitive bids received; and when the purchase price is in excess of two thousand dollars no purchase shall be made unless competitive bids are received after advertising therefor in a newspaper of general circulation at least once a week for not less than two consecutive weeks prior to the date on which bids are received" except where it has been determined by "the executive head of any agency of the state . . . that a real emergency exists in regard to the purchase of any commodity" as defined in the said statute. Subsection (2) of said §8 of Ch. 57-171 (it does not appear that §287.08 contained a similar provision), makes provision for the purchase of "non-competitive items which are only available from one source;" however, certain requirements, which are set out in the subsection, must be complied with in this connection.

Both Ch. 287, F. S., and Ch. 57-121, 1957, are made applicable to "all the various state agencies, officers, departments, boards, commissions and institutions" (§287.01(1), F. S., and of §1 of Ch. 57-121, *supra*). As to the above question in so far as it relates to printing, the court, in *State v. Lee*, 150 Fla. 35, 7 So. 2d 110, text

113, remarked that the "legal mechanics to be observed by departments, *state agencies and officials* in the letting of a contract for public printing are set forth" in a former case. (Emphasis supplied.) Chapter 283, F. S., was held, in this case, to be applicable to printing for the Florida citrus commission, which was held to be a department of the state government.

In *State v. Lee*, 117 Fla. 779, 158 So. 461, the court appears to have considered Ch. 283, F. S., applicable to the state motor vehicle department, although the commodity in question appears to have been held not to be printing. This office has applied the statute to printing for the state board of health (1947-8 B. R. 374), the Florida state advertising commission (1945-6 B. R. 471) and the state board of control (1953-4 B. R. 356).

The Jacksonville expressway authority was created and established, by Ch. 29996, 1955, as "a body politic and corporate *and agency of the State of Florida . . .*" (§§2(a) and 3 of said Ch. 29996). Under §3 of said Ch. 29996, the authority consists of five members—two ex officio members and three appointed by the governor. The authority is declared, in §13 of said Ch. 29996 to have been created and established "for the benefit of the people of the State of Florida . . .," and is exempted from all taxation as a governmental agency. The Jacksonville expressway authority having been created and established as "a body politic and corporate *and agency of the State of Florida . . .*" and Ch. 57-121 being applicable to "all the various *state agencies*, officers, departments, boards, commissions and institutions," of the state, such authority appears to be within the intent and purview of said Ch. 57-121, as well as Ch. 287, F. S., and is governed thereby as to the purchase of commodities as defined in said chapters. Being an agency of the state, it seems that Ch. 283, F. S., would likewise be applicable to printing for the said authority.

The above stated question is, therefore, answered in the affirmative; subject to a determination of whether the purchase of the national accounting machine may have been within the same provision of §287.08, F. S. (§8, Ch. 57-171, 1957) authorizing purchase without advertisement and obtaining bids.

057-211—July 26, 1957

CRIMES

VIOLATION OF LOTTERY LAWS OF FLORIDA

To: William D. Doss, Prosecuting Attorney, Quincy

QUESTION:

Does the following plan constitute a violation of the lottery laws of the state of Florida?

The party owns a motor court valued at approximately \$60,000. He wishes to go out and sell a night's lodging or a room for some designated night for the sum of \$100 and to give each purchaser a ticket or chance on winning a motor court at a drawing to be held when a sufficient number of sales have been made—in the event that a sufficient number of sales were not made that a return of the money would be made to each purchaser.

It is well settled law that there are three elements to a lottery, viz: (1) a prize, (2) an award by chance, and (3) a consideration.

Since your question regarding the motor court owner is worded "he wishes to go out" and do thus and so, it would be a moot question as to whether the same constituted a violation. Therefore, for the purpose of rendering an opinion we are assuming that the owner is actually engaged in the activity described in your question. In this light the transaction outlined above clearly contains the second element of a lottery, to-wit: an award by chance. Likewise, the element of prize is apparent, since there is no element of skill involved on the part of the participants in the transaction.

The remaining element of consideration is satisfied by the following conclusion: The participant pays primarily for the opportunity to participate in the eventual drawing and secondarily for a night's lodging. As a matter of fact, the consideration for lodging is practically nil, compared to the actual purpose involved in the transaction outlined. The owner profits by disposing of certain property for an undisclosed amount, which amount will obviously not represent a loss to the owner since your question states that a motor court would be given away "when a sufficient number of sales have been made."

Your question is therefore answered in the affirmative.

057-212—July 26, 1957

LEGISLATURE

IMPEACHMENT PROCEEDINGS—CERTAIN POWERS OF THE BOARD OF MANAGERS—§4, ART. IX, §29, ART. III, STATE CONST.

To: A. J. Musselman, Jr., House of Representatives, Tallahassee
QUESTIONS:

1. May the county solicitor of Hillsborough county and the state attorney for the 2nd judicial circuit of Florida properly be employed to assist the board of managers appointed under house resolution 1945 of the 1957 legislature in the prosecution of impeachment proceedings against Circuit Judge George E. Holt? If so, how should their compensation be determined?

2. Is said board of managers empowered to employ other assistance, such as clerical, secretarial, research clerk and investigators? If so, should their compensation be fixed on a weekly or contract basis?

3. Is said board of managers authorized to open a bank account with funds derived by action of the state budget commission?

4. May the board of managers contract with an employee for payment of expenses other than his stipulated compensation?

AS TO QUESTION 1:

You point out that you and Representative Beasley were appointed managers by the speaker of the house, pursuant to house resolution 1945 of the 1957 legislature, for the purpose of conducting the prosecution of Circuit Judge George E. Holt in the Florida senate; that county solicitor Paul Johnson of Hillsborough county

and State Attorney William Hopkins, of the second judicial circuit, are assisting in the prosecution of the impeachment proceedings.

Your attention is directed to house resolution 1946, appearing upon the journal of the house of representatives of May 27, 1957, at p. 1759, by which the board of managers, on the part of the house, is authorized and empowered to "employ legal, clerical and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case to be paid out of the legislative expense on vouchers approved by the board of managers." There is a grave question as to the effectiveness of this resolution to appropriate funds, inasmuch as it does not conform to constitutional requirements (§4, Art. IX, Fla. Const.). Impeachment proceedings originate in the house of representatives (§29, Article III, Fla. Const.). The house of representatives, after filing of articles of impeachment, is responsible for the prosecution of the accused. Legal precedent, as well as the rules adopted by the senate while sitting as a court of impeachment, supports this proposition (See journal of senate for July 8, 1957). Hence, it is contemplated that the managers who act on behalf of the house of representatives should be authorized and empowered to employ such necessary assistants, clerical or legal, as in their sound judgment are required for the proper prosecution of the proceeding in the senate. We have made no examination of local or population acts to determine whether or not any exist which might prohibit either Mr. Hopkins or Mr. Johnson from accepting private employment, but we assume there are none. Based upon that assumption, I conclude that the board of managers may properly employ these gentlemen and agree to pay them for services rendered the amounts considered reasonable and proper commensurate with the services rendered and within the limitation of available funds. The question is answered in the affirmative.

AS TO QUESTION 2:

I believe the answer to the 1st question applies here and the method by which such payment should be made, that is whether by contract price or on weekly or monthly basis, is for the considered judgment and sound discretion of the board of managers. The question is answered in the affirmative.

AS TO QUESTION 3:

The state budget commission, we are informed, established a revolving fund on two occasions—one, in the sum of \$1,000 and the second for \$4,000. State warrants issued in these amounts and it is our understanding that a bank account was to be opened in the name of the board of managers and said funds expended in connection with expenses incurred, particularly payment of witnesses and sheriffs' fees for serving witnesses. This procedure is in order, but every precaution should be taken so that a proper accounting can be made to the comptroller when the account is finally closed. For your information and protection we suggest you consult the chief auditor in the state comptroller's office as to the procedure to be followed. The question is answered in the affirmative.

AS TO QUESTION 4:

We assume that you have in mind travel expenses. It seems to me that while the employees of the board of managers are entitled to travel expenses, the determination of the amount to

be paid should be based upon that allowed for state employees and that appropriate vouchers should be submitted by the traveler and approved by the board of managers. See Ch. 57-230, 1957, pertaining to per diem and travel expenses. As qualified, the question is answered in the affirmative.

057-213—July 29, 1957

PUBLIC BUSINESS

GENERAL APPROPRIATIONS—CONSTRUCTION OF ITEM 36 OF GENERAL APPROPRIATIONS ACT OF 1957 AS AMENDED—CHS. 57-424 AND 57-425 (§282.01(1), F. S.)

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

In complying with the proviso in item 36 of §1 of Ch. 57-424, as amended by Ch. 57-425, where a reduction must be made in the overall salary of a circuit judge or circuit judges, should the reduction be made in the state appropriation, or in the county appropriation, or in both?

Item 36 of §1 of Ch. 57-424, the same being the 1957 general appropriations act, made a lump sum appropriation to the judicial department of the state, which appropriation contains the memorandum "including salary of \$13,500 per annum for each circuit judge," and the following proviso:

Provided the combined compensation of no circuit judge, when paid from state and local funds, may exceed that of the senior circuit judge of his circuit or that of the judges of the district court of appeals of the district wherein his circuit lies, whichever is greater; and provided, further, that this provision shall not be construed to reduce compensation of any circuit judge below that being paid him on April 2, 1957.

This proviso was amended by Ch. 57-425, so as to read as follows:

Provided, however, that no circuit judge's salary, including supplements, shall exceed the salary of any judge of the District Courts of Appeal, including supplements, having appellate jurisdiction of the circuit wherein such circuit judge holds office, or the salary of the senior circuit judge of such circuit, on April 2, 1957, whichever is greater; and provided further that this provision shall not operate to reduce the total compensation, including supplements, of any circuit judge below the compensation being paid and received by such judge on April 2, 1957. (Emphasis supplied.)

The above provisos provide that (1) no circuit judge's salary may exceed, including supplements, that of judges of the district courts of appeal, including any supplements they may receive, or (2) the salary (evidently including supplements) of the senior circuit judge of a circuit as of April 2, 1957. No circuit judge's salary may be reduced below that received by him (evidently including supplements) on April 2, 1957.

Chapter 57-424, the 1957 general appropriations act, became a law on June 20, 1957, and took effect on July 1, 1957; Ch. 57-425 became a law on the same day, and §2 thereof provided that it

should "take effect subsequent to the effective date of senate bill 338 (Ch. 57-424) and shall be amendatory to such act as affecting the proviso statement in item 36 of §1." We feel that it is clear from said §2, when read in conjunction with Ch. 57-424 and the constitutional provisions relating to general appropriations, that said Ch. 57-425 became effective, immediately after the taking effect of chapter 57-424, on July 1, 1957. Under these provisions, and some laws providing for supplemental salaries for circuit judges in some circuits or counties, doubtless the salary provided by said item 36 of §1 of the 1957 general appropriations act, and \$216.171(5), F. S., (\$13,500 per annum of the biennium) will exceed the limitations applicable under the said proviso in item 36 of §1 of the 1957 general appropriations act, as amended by Ch. 57-425, and will have to be reduced under the proviso to the applicable limitation in the proviso as amended.

When there is such a reduction in the state compensation and the county supplement, the question immediately arises as to where the reduction shall be taken; should the state salary be reduced in a sufficient amount to meet the requirements of the said proviso as amended, or should the supplemental salary be so reduced, or should the state salary and the supplemental salary be reduced. We know of nothing in the statutes or laws specifying the salary to be reduced under such circumstances, and there being no such statute or law it would seem to be equitable that both the state salary and the supplemental salary be reduced proportionally.

The above answer contemplates statutes, prior in time to said Chs. 57-424 and 57-425, fixing definite supplementary compensation and does not consider acts that do not provide a fixed supplemental compensation. These observations raise a question which depends of necessity upon the language of each particular act so that each must be considered as a separate question; for example, acts providing for supplemental salaries *to be fixed* by county commissioners or other designated officers, boards or commissions within fixed limitations. Under such acts it would seem that the board could, and probably should, fix the compensation so that the combined state compensation and the supplement do not exceed the limitation above mentioned in said Chs. 57-424 and 57-425.

There may also be acts fixing supplemental salaries that were enacted subsequently to said Chs. 57-424 and 57-425 which may or may not be affected by the proviso in item 36 thereof above mentioned. These acts will have to be considered and the question determined as to each particular act.

The above observations seem to answer the above stated question as well as the same may be answered on the record before us. Where the supplemental salary is a fixed amount not subject to change, other than by the legislature, and the state compensation and said supplemental salary exceed the limitation fixed by said Chs. 57-424 and 57-425, then we feel that both the state salary and the supplemental salary should be reduced proportionately.

057-214—July 29, 1957

EDUCATION

COUNTY SCHOOL SYSTEM—COUNTY SUPERINTENDENT
APPOINTED UNDER §2A., ART. XII, STATE CONST.—
§230.321 (CH. 57-308) AND CH. 57-1113 (H. B. 1763).To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. Under §2A. Art. XII, State Const., house bill 1763, special acts of 1957, and house bill 1168, Ch. 57-308, acts of 1957, may the board of public instruction of Sarasota county elect and appoint to the office of county superintendent of public instruction of Sarasota county, one other than the present incumbent?

2. May the board of public instruction of Sarasota county, pursuant to §2A. Art. XII, State Const., house bill 1763, special acts of 1957, and house bill 1168, Ch. 57-308, acts of 1957, elect and appoint to the office of county superintendent of public instruction of Sarasota county, the present incumbent of said office or some other person and make the appointment for a period of two years?

Your 1st question was answered by my opinion No. 057-13 affirmatively.

I believe your 2nd question must be answered in the negative. Section 2, Art. XII, State Const., provides:

Superintendent of Public Instruction; term.—There shall be a Superintendent of Public Instruction, whose duties shall be prescribed by law, and whose term of office shall be four years and until the election and qualification of his successor.

This section of the constitution must be construed with the new amendment. It does not appear that the term of office of county school superintendent has been changed from the four-year term provided. In my opinion the cycle of office for this position has not been disturbed. In other words, the school board of Sarasota county should now appoint either the incumbent or some other person to the office of school superintendent for the remainder of the present unexpired term. At the end of the present term the board should fill the position by appointment for the next four-year term.

057-215—July 30, 1957

PUBLIC LANDS AND PROPERTY

INTERNAL IMPROVEMENT FUND—CONFIRMATION OF
TITLE TO CERTAIN LANDS IN UPLAND OWNERS—
DISCLAIMERS—§9, CH. 57-362, (§253.129, F. S.).To: *Trustees of Internal Improvement Fund, Tallahassee*

QUESTIONS:

1. Do the trustees of the internal improvement fund have authority to require payment for disclaimers issued pursuant to §9 of Ch. 57-362, on a basis comparable to that charged under similar conditions prior to the passage of Ch. 57-362?

2. Should the intended issuance of such disclaimers

be the subject of advertisement for objections?

3. What recitals of fact and legal authority should be contained in the disclaimer?

4. In what form should proof be furnished regarding the extent and time of filling?

Chapter 57-362 is a general and comprehensive statute which vests title to sovereignty tidal and submerged bottom lands (as defined in §1 of the act) in the trustees of the internal improvement fund, provides the procedure by which such lands may be sold, authorizes the establishment of bulkhead lines, provides the procedure to be followed in processing applications to buy and fill such submerged lands and, among other things, repeals §271.01, F. S., commonly known as the Butler act.

Your questions relate to §9 of Ch. 57-362, which provides:

Section 271.01, Florida Statutes, is hereby expressly repealed. Provided, however, the title to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each such owner.

A careful analysis of the history of §271.01, F. S., and §253.12, F. S., clearly indicates that §9 of Ch. 57-362, 1957, applies to lands heretofore filled in Dade and Palm Beach counties under and pursuant to said §271.01, and applies to lands filled in the remaining 65 counties under and pursuant to §271.01, F. S., prior to the effective date of Ch. 26776, 1951. Section 9 of Ch. 57-362 does not apply to any lands filled in any county in Florida subsequent to the effective date of Ch. 26776, 1951, except the counties of Dade and Palm Beach. This conclusion is supported by the fact that, except for lands in Dade and Palm Beach counties, the legislature, by the enactment of Ch. 26776, 1951, vested title to all sovereign tidal water bottoms, including all islands, sandbars, shallow banks, etc., in the trustees of the internal improvement fund. This office has consistently, since the enactment of Ch. 26776 in 1951, construed said Ch. 26776 as repealing §271.01 in all counties except Dade and Palm Beach. Furthermore, the interpretation this office has given Ch. 26776, 1951, is supported by the case of Duval Engineering and Construction Co. v. Sales, 77 So. 2d 431, notwithstanding the fact that the constitutionality of the act was not raised in that case. The legislature was well aware of the fact that for six years this office has construed Ch. 26776 as repealing §271.01 in all counties except Dade and Palm Beach.

My conclusion, that §9 of said Ch. 57-362 applies only to Dade and Palm Beach counties, is also supported by the last paragraph of §253.12(1), F. S., as amended, which reads as follows:

When any person, state agency, county, city or other political subdivision has heretofore extended or added to existing lands or islands bordering on or being in the navigable waters as defined in §253.12 herein by filling in or causing to be filled in such lands the trustees of the internal improvement fund shall upon application therefor convey said land so filled to the riparian owner or owners of the upland so extended or added to. *The consideration for such conveyance shall be the appraised value of said lands as they existed prior to such filling.* (Emphasis supplied.)

It is my opinion that the last paragraph of §253.12(1) applies to all counties except Dade and Palm Beach. Otherwise, the two provisions of Ch. 57-362, quoted above, would appear to be in conflict and it certainly is not to be presumed that the legislature enacted conflicting statutes. The supreme court of Florida has held that apparently inconsistent provisions of a statute should be construed to harmonize and so as to give each a field of operation if possible (*State ex rel Hathaway v. Williams et al*, 149 Fla. 48, 5 So. 2d 269; *Ideal Farms Drainage District v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234; *Palmquist v. Johnson*, 41 So. 2d 313).

As stated above, it is my opinion that §9 of Ch. 57-362, applies to lands filled in Dade and Palm Beach counties under and pursuant to §271.01, F. S., prior to June 11, 1957, and applies to lands filled in the remaining 65 counties under and pursuant to §271.01, F. S., prior to the effective date of Ch. 26776, 1951, which repealed §271.01 in all counties except Dade and Palm Beach. Title to lands which have been filled or developed in Dade and Palm Beach counties under §271.01, F. S., prior to June 11, 1957, has been confirmed in the upland owners and such owners are entitled to disclaimers to such filled lands. However, as to the remaining 65 counties only lands filled under §271.01, F. S., prior to the effective date of Ch. 26776, 1951, have been confirmed in the upland owners so as to entitle such upland owners to disclaimers to such filled lands. Any lands in any county except Dade and Palm Beach, as defined in §253.12, F. S., which have been filled subsequent to the effective date of Ch. 26776, 1951, do not qualify under §9 of Ch. 57-362 and such lands are subject to the provisions of the last paragraph of §253.12(1), as amended by Ch. 57-362.

As to lands which have been filled or developed to which §9 of Ch. 57-362 is applicable, your questions are answered as follows:

1. Question 1 is answered in the negative. I find no authority for the trustees to make any charge for issuing the disclaimer which they are directed to issue pursuant to §9 of said Ch. 57-362. I do believe, however, the trustees may, in their discretion, charge a reasonable fee for processing applications for such disclaimers.

2. Question 2 is answered in the negative. The issuance of a disclaimer under §9 of Ch. 57-362 does not constitute a sale of submerged land and does not come within the purview of §1 of Ch. 57-362 which requires that lands, as defined therein, be sold after advertisements for objections.

3. Disclaimers issued under authority of §9 of Ch. 57-362 should recite that they are issued under and pursuant to said §9 of said Ch. 57-362.

4. It is my opinion that applications for disclaimers under §9 of Ch. 57-362 should contain a description of the lands to be disclaimed, should be accompanied by an affidavit of a registered engineer that the lands, as described in the application, have been filled. Applications from Dade and Palm Beach counties should be accompanied by an affidavit of the applicant that the lands described in the application were filled prior to June 11, 1957, the effective date of said Ch. 57-362. Applications from all counties except Dade and Palm Beach should be accompanied by an affidavit of the applicant that the lands described in the application were filled prior to the effective date of Ch. 26776, 1951.

057-218—July 30, 1957

INSURANCE

FIRE, CASUALTY AND SURETY INSURANCE-DEPOSIT OF BONDS REQUIRED BY §631.06 AS AMENDED BY CH. 57-100, §§631.06-631.10, 631.17, 626.05, 626.06 AND 625.02, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

What is the status of deposits by fire insurance companies under former §631.06, F. S., in view of the provisions of Ch. 57-100, effective July 1, 1957, amending such sections as described below?

Former §631.06 F. S., required the deposit by "every fire insurance company" with the insurance commissioner of \$20,000 in described securities, or a surety bond in like amount, "for the protection of all legal claims against such company in this state." Section 631.08, not amended by Ch. 57-100, provides that such deposit shall be liable for payment of judgments of the depositing insurer, following the procedure prescribed therein. Former §631.09, amended by Ch. 57-100, specifically states that "the holders of all policies of said insurer who are citizens and residents of this state at such time, or who hold policies on property in this state, shall have a lien for the amount due them, respectively, under and in consequence of such policies, for losses, return premiums and equitable values . . . to be paid ratably out of the proceeds of said bonds (if such proceeds be not sufficient to pay all of said policyholders)"; and there is provision that when such an insurer becomes insolvent, "any holder of such policy" may begin action in the circuit court of Leon county "to obtain administration of proceeds of the deposit."

These sections have been reviewed by our supreme court in but one case, *Bohlinger v. Higginbotham*, Fla., 70 So. 2d 911; but that case is of little benefit here. However, in the case of *Kelly v. Knott*, Fla., 163 So. 64, the court discussed the nature of the deposit required of surety companies; and the remarks of the court in that connection are applicable to the intent and purpose of §631.06-631.10, as they existed prior to the aforesaid amendments: "While the deposited securities of a solvent and going surety concern still transacting business in Florida do constitute (as was held in the *Yetter* case, *supra*) a *special security* for the payment of judgments rendered against surety companies in this state . . . the fund represented by the deposited securities is also in the nature of a *fund held in trust* for the benefit of domestic creditors of the depositing surety company, as a condition precedent to its right to transact a surety business in this state. . . ." (Emphasis supplied.)

Section 631.06 as amended by §5 of Ch. 57-100 to require "every fire insurance company, title insurance company, and casualty insurance company" to deposit with the commissioner "for the protection of all policyholders and creditors" described securities in the amount of \$50,000; with the provision that as to such a foreign insurer, if said deposit is made in its domiciliary state, or some other state, such shall meet the requirements of the section. Section 631.09 was amended by §6 of said chapter to create a lien on the deposit in favor of "holders of all poli-

cies of said insurer," with provisions similar to the amended section concerning administration of the proceeds of such deposit in the circuit court of Leon county, Florida, in event of the insurer's insolvency.

Certain other amendments set forth in Ch. 57-100 are relevant. Section 625.02 (formerly requiring capital stock of not less than \$100,000, with no mention of surplus) is amended to provide that insurance and surety companies, unless otherwise provided, incorporated under the laws of this state, shall have not less than \$200,000 paid up capital stock and not less than \$200,000 surplus, or surplus in an amount equal to 50% of paid up capital stock, whichever is greater; provided, that such requirements do not apply to those domestic companies possessed of a certificate of authority issued on or before July 1, 1957. Former §626.05 required foreign insurers, other than life, to be possessed of assets worth at least \$250,000, invested as prescribed; and former §626.06 required foreign life companies to be possessed of and have \$200,000 invested, as set forth. Chapter 57-100 repealed §626.06 and amended §626.05 to require that a foreign insurer shall have had three years satisfactory operation in its domiciliary state or country and assets worth at least \$400,000, invested as specified. Section 631.17 formerly provided that no fire, casualty or surety company "doing business in this state, except as provided herein, shall expose itself to any loss on any one risk located in this state in an amount *exceeding two times its surplus* to policyholders provided:" followed by certain conditions. (Emphasis supplied.) That section is amended by Ch. 57-100 to substitute for the quoted italicized words the following, "exceeding ten per cent (10%) of its surplus."

Section 9 of Ch. 57-100 specifically repeals §626.06. Section 10 of the chapter repeals all laws and parts of laws in conflict therewith. Section 11 of the chapter provides that the act shall take effect July 1, 1957.

No mention is made in Ch. 57-100 concerning the \$20,000 deposits heretofore made with the commissioner under former §631.06. Heretofore it has been the consistent position of this office that when a fire insurance company ceased to engage in business in this state, prerequisite to its obtaining return to it of its deposit, it was required to evidence to the commissioner that it had no fixed or contingent liabilities on its policies in this state, subject to the qualifying provisions of the second unnumbered paragraph of §631.10. So the primary inquiry is whether such fire insurance companies are authorized to withdraw the \$20,000 deposits heretofore made, as of July 1, 1957, under authority of Ch. 57-100 without there being occasioned an impairment of existing contracts within the contemplation of federal and state constitutions. In applying the provisions of amended §631.06, consideration must also be given the provisions of §631.08.

"The constitutional protection of the obligation of contracts is necessarily subject to the police power of the state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by the courts, although it incidentally destroys existing contract rights. . . . All contracts made with reference to any matter that is subject to regulation under the

police power must be understood as made in reference to the possible exercise of that power." 12 Am. Jur. 54, §421; *Miami Bridge Co. v. R. R. Commission*, (Fla., 20 So. 2d 356; *Mahood v. Bessemer Properties, Fla.*, 18 So. 2d 775; *Southern Utilities Co. v. City of Palatka, Fla.* 99 So. 936, 264 U. S. 580, 68 L. Ed. 859. Or to express the same principle differently, constitutional provisions relating to the impairment of contracts must yield to the expressed policy of the state in the public interest. *Lobrano v. Milligan*, 9 Wall. 295, 19 L. Ed. 694; *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. Ed. 690; *Dodge v. Board of Education of City of Chicago*, 302 U. S. 74, 82 L. Ed. 57; *Alliance Mutual Life Ins. Soc. v. Welch*, 26 Kan. 632; *Illinois Life Ins. Co. v. Tully*, C. C. A. 8th Cir., 174 Fed. 355.

We are here dealing with police power and state policy. We are not to isolate the amendment of §631.06 in relation to that policy; by the very act which accomplished that amendment, the other mentioned amendments concerning surplus, assets, and policy limits in relation to surplus did more to assure the solvency of insurers operating in this state and, hence, the security of policyholders, than was assured to Florida policyholder by the \$20,000 deposit, even though the \$50,000 deposit for all policyholders had not been provided. The experience of Florida policyholders of an insolvent company in relation to administration and distribution of deposits required by former §631.09 has not been happy. The deposit of Preferred Accident Ins. Co. (*Bohlinger v. Higginbotham*, supra) did not net over 50%; that of Inland Empire insurance company not in excess of 10% (and there were \$40,000 in securities); that of Central Standard insurance company of Sioux Falls, S. D., paid off (there were but 10 claims); and what will happen in the distribution of \$40,000 in deposits of ICT Insurance company is problematical. Further, following reasoning of the court in *Alliance Mut. Life Ins. Soc. v. Welch*, supra, policyholders at July 1, 1957, of fire insurance companies had no vested right to any particular securities deposited by the respective insurers; such insurers could withdraw such securities upon substitution of others; and in event of insolvency the value of the lien of the policyholder with respect to such securities depended entirely upon outstanding policy liability. We repeat, Ch. 57-100 in its several mentioned provisions represents state policy in relation to mentioned insurers; that determined policy may not be infringed by existing contracts; and on the face of the law, the policy is beneficial and in the public interest.

We now turn to the relationship between the provisions in amended §631.06 (4), permitting deposit with officials of other states, and those of §631.08, setting forth the procedure to be followed to obtain payment of judgment out of the deposit. At this point we revert to the quoted matter from *Kelly v. Knott*, supra, and the remarks of the court that such a deposit constitutes, among other things, "special security for the payment of judgments." Whereas, heretofore the deposit in the hands of the commissioner was subject only to payment of Florida judgment creditors under §631.08, now the \$50,000 deposit is subject to payment of judgments obtained on policies in other states. Deposit of such \$50,000 in securities with officials of another state

will meet the requirements of amended §631.06 only if under the laws of the state where the deposit is made a Florida judgment obtained on a policy is payable out of such deposit by the filing with the appropriate official of such other state duly authenticated records thereof without necessity of proceedings in such other state.

In view of the foregoing, in my opinion the question is answered as follows:

The amendment of §631.06 by Ch. 57-100, as aforesaid, in effect constituted repeal of the former section requiring the \$20,000 deposit for benefit of Florida policyholders, effective July 1, 1957. The amended section is valid legislation of the state concerning its policy relating to security of policyholders of insurers operating in Florida, and as a proper exercise of the police power it is not vulnerable to the charge that it constitutes an unconstitutional impairment of contracts as to policies in force on and issued prior to the effective date of the act. The insurance commissioner is authorized to deliver back to depositing insurers the \$20,000 deposits made by them under §631.06 prior to July 1, 1957; provided, that if any judgment holder prior to said date applied to the insurance commissioner for satisfaction of a judgment out of such deposit, and such was not accomplished by said date, the deposit should be retained (or surety bond remains liable) until that is done.

Attention is directed to the above remarks concerning the relationship between mentioned provisions of §631.06(4) and §631.08.

Nothing in this opinion shall be taken as determinative of the effect of amendment of §648.02 by §8 of Ch. 57-100.

057-219—August 1, 1957

SALE OF LIQUID FUELS

STATE FIRE MARSHAL—MUNICIPALITY ENGAGED IN LIQUEFIED PETROLEUM GAS BUSINESS—

§§526.12-526.20, F. S.

To: *J. Edwin Larson, State Fire Marshal, Tallahassee*

QUESTION:

When a municipality in Florida engages in the business of selling liquefied petroleum gas to ultimate consumers thereof, do such operations fall within the purview of §§526.12-526.20, F. S.?

The request for opinion states that it has recently been determined that a municipality in this state is operating a liquefied petroleum gas business as a municipal function; that "they own tanks for bulk storage, sell gas in cylinders, and also sell gas delivered in tanks to consumers' locations." Specifically inquiry is made whether such operations fall within the purview of §§526.13, 526.14 and 526.16, F. S.

Sections 526.12-526.20, F. S., regulate the storage, sale, distribution and use of liquefied petroleum gas. Section 526.12 defines certain terms used in these sections. Section 526.13 requires licenses to be obtained by dealers in such gas, manufacturers of appliances for use of such gas, dealers in such appliances and those engaged in the installation of apparatus, etc.,

for storage and use of such gas. Section 526.14 requires licensees under these sections, other than dealers in appliances, to furnish bonds in the amount of \$25,000, conditioned as provided, or insurance coverage in lieu thereof, as described. Section 526.16 empowers the state fire marshal to make, promulgate and enforce regulations covering the detailed matters set forth in such section.

On Nov. 17, 1948, my immediate predecessor in office issued opinion 048-346 (1947-48 B. R. 488). It is to be observed that the question dealt with in such opinion was whether a Florida municipality might, by agreement, appoint persons who were not city employees as agents of the city to install all appliances for use of liquefied petroleum gas, sold by said municipality at the sites of the ultimate consumers. The following conclusion in such opinion is particularly noted: "When I consider the entire statute and the intent and purpose of it, I do not think that the Legislature intended to exclude municipal corporations from the purview of said enactment when selling gases and installing equipment within the purview of the statute."

Sections 526.12-526.20 were originally Ch. 24302, 1947. Since adoption of said chapter and inclusion of the same in Florida Statutes, as aforesaid, there have been a number of amendments. However, such amendments have not been such as to change the effect of the above opinion. I agree with the conclusions set forth in opinion 048-346; and on the basis of the authorities and conclusions set forth therein, it is my opinion that the above question properly is answered in the affirmative.

057-220—August 1, 1957

INSURANCE

AUTOMOBILE CLUBS—DISPOSITION OF LICENSE FEE— CH. 57-65, (CH. 649, F. S.)

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

Into what state fund should be deposited the license fees received from automobile clubs as provided by §3 of Ch. 57-65?

Chapter 57-65 provides for the qualification, licensing and regulation of automobile clubs. Section 3 of the act requires that an automobile club applying to engage in its operations in this state shall pay a license fee of \$100 annually, such license expiring on Sept. 30 of each year. Since the application for license to engage in such operations as an automobile club must be made to the insurance commissioner, it is assumed without question that said license fee is paid to that officer also. There is no specific provision in Ch. 57-65 concerning the disposition of such a license fee. In my opinion such a fee shall be deposited in the general revenue fund of the state, which furnishes answer to the above question.

057-221—August 1, 1957

SHERIFFS

**JURISDICTION OF SHERIFF OF MONROE COUNTY—§§7.44,
901.15, F. S., ART. I, STATE CONST.**

To: John A. Madigan, Jr., Florida Sheriffs Association

QUESTIONS:

1. What are the territorial limits of the jurisdiction of the sheriff of Monroe county in and among the islands and keys in the Monroe county area?

2. How many miles into the gulf, and on the Atlantic side, and from what starting point, does his jurisdiction extend?

3. What is the authority and jurisdiction of the sheriff over boats and vessels in and about the keys and islands?

4. Does the sheriff have the right and authority to board a boat or ship to apprehend a fugitive or a suspect? With or without a warrant? Does it make any difference whether the boat or ship is tied to the dock, anchored, standing off shore, or underway?

AS TO QUESTIONS 1 AND 2:

Answering your questions in their numbered order, Section 7.44, F. S., provides as follows:

So much of the state as is situated south of the county of Collier and west or south of the county of Dade, constitutes the county of Monroe.

Article I of the Florida constitution relative to the boundaries of Florida insofar as Monroe county is concerned provides that the boundary of the state after it enters the Atlantic ocean from St. Mary's river is southeastwardly along the coast to the edge of the gulf stream; thence southwestwardly along the edge of the gulf stream and Florida reefs to and including the Tortugas islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land to a point west of the mouth of the Perdido river.

The submerged lands act, §1301(b), and §1312 of title 43, U. S. code, provides as follows:

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.

§1312. Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State ad-

mitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, *without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress, May 22, 1953, c. 65, Title 11, §4, 67 Stat. 31. (Emphasis supplied.)*

The purpose of these sections, and particularly §1312, since it is labeled "Seaward boundaries of States," seems to be two-fold, (1) to permit and allow each state insofar as its boundary on the ocean side is concerned to extend its boundary, if it has not already done so, to at least three geographical miles distance from its coast line, but to limit the distance on the ocean side to the said three miles, and (2) to permit and allow each original coastal state to extend its boundary on the Gulf side to at least three geographical miles distance from its coast line, but recognizing any claim that any such original coastal state may have heretofore asserted by constitutional provision, statute, or otherwise, to territory beyond such three geographical miles on the coastal side without prejudice to such state's claim that its boundary extends beyond such three geographical miles, however, limiting such claim to a distance not to exceed three marine leagues from its coast line into the Gulf of Mexico.

The above seems to answer your questions 1 and 2.

AS TO QUESTION 3:

The sheriff of Monroe county has the same authority and jurisdiction over boats and vessels in and about the keys and islands within the jurisdiction of Monroe county as he would over motor vehicles on the public highways of the state insofar as violation of any law of the state is concerned.

There seems to be no question but that the state through its proper officers can enforce a criminal statute and take the necessary action to apprehend violators of such statutes within the territorial limits of the state. This was clearly pointed out in the case of *Skiriotes v. State of Florida*, 61 Supreme Court 924, 313 U. S. 68, 85 L. Ed. 1193, rehearing denied 85 L. Ed. 1552. In that case *Skiriotes* had been arrested for violating a Florida statute forbidding use of diving equipment for purposes of taking sponges from the Gulf of Mexico, but within the western boundary of Florida three marine leagues from the mainland.

AS TO QUESTION 4:

Section 901.15, F. S., provides as follows:

A peace officer may without warrant arrest a person:

- (1) When the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence. In the case of such arrest for

a misdemeanor or violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit.

(2) When a felony has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it.

(3) When he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.

(4) When a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution.

After a person has been arrested a reasonable search and seizure may be made incident to a lawful arrest; *Mixon v. State*, Fla., 54 So. 2d 190; *Brown v. State*, 46 So. 2d 479; *Zygula v. State*, 51 So. 2d 287; and insofar as boats and vessels are concerned, the master or captain is in complete control and charge of such vessels and will oftentimes give a law enforcement officer authority to search the vessel, thus waiving any constitutional rights that he might have to require a search warrant. This is particularly true where the law enforcement officer has a warrant for an arrest of a person whom he suspects of being a member of the crew of such vessel. There is no question but that the constitutional guarantee against unreasonable searches and seizures can be waived if desired; see *Shay v. State*, 70 So. 2d 363; and *James v. State*, 80 So. 2d 699.

057-223—August 1, 1957

TAXATION

FLORIDA POWER CORPORATION EMPLOYEES RETIREMENT FUNDS—FOREIGN TRUSTEES—INTEREST OF BENEFICIARIES—TAXATION—CH.

199, §§192.01, 660.10, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Is the intangible corpus of the Florida Power Corp. employees retirement fund, held by the Guaranty Trust Co. of New York, subject to taxation in this state under Chapter 199, F. S.?

2. Is the interest of the members and other beneficiaries in or to such retirement fund subject to taxation in this state under said Ch. 199, F. S.?

"Unless expressly exempted from taxation, all real and personal property in this state, and all personal property belonging to persons residing in this state, shall be subject to taxation in the manner provided by law" (§192.01, F. S.). Intangible personal property taxes are imposed in this state under and in accordance with Ch. 199, F. S. If the property mentioned in the two above stated questions are subject to taxation in this state they must have a taxable situs in this state, either actually or constructively (84 C. J. S. 222, et seq., §§112, et seq.) Except where the property itself has acquired a separate situs from the residence of its owner, the situs of intangible personal property held by a trustee is, for the purpose of taxation, at the domicile of the trustee (84 C. J. S.

238, §117; *State v. Beardsley*, 77 Fla. 803, 82 So. 794). "The domicile of its owner is the situs which in general is given to such intangible personal property by the law" (*Wood v. Ford*, 148 Fla. 66, 3 So. 2d 490, text 495). Under the rule of our opinion of March 6, 1957 (057-62) funds held in trust for the use and benefit of retirement plans for officers and employees of corporate and private industrial establishments are subject to taxation by this state when they have their situs in this state.

Under the Florida Power Corp. employees retirement plan, both the corporation and its employees make contributions to the fund from which retirement compensation is to be paid. When a member of the plan ceases to be an employee of the said corporation his membership in the plan ceases, although he may have refunded to him the contributions made by him to the retirement fund. Upon retirement the retirement compensation, with one or two exceptions, is paid monthly to the retired member for the remainder of his life. All expenses of administering the said retirement plan, except investment expenses and taxes, are paid by the power corporation. Investment expenses and taxes are paid from the retirement fund. All contributions by the corporation and members are irrevocable and must be transferred to the trustee to become a part of the retirement trust fund. On Sept. 29, 1944, the Florida Power Corp., evidently on its own behalf and for the benefit of the members of the retirement system, entered into a contract with the Guaranty Trust Co. of N. Y. under which contract the said trust company became trustee of the retirement funds to be administered under the said trust contract and the provisions of the retirement agreement. It is recited in this agreement "that contributions of the employers and the members (employees) are to be placed in a trust fund for the benefit of the members, retired members and their beneficiaries." "The trustee is expressly authorized and empowered to invest and reinvest the fund in its discretion in those stocks (of any classification), bonds, or other property in which any of the funds of life insurance companies organized under the laws of the State of New York may from time to time be invested . . ." The trustee is given broad powers when administering the trust (see paragraph five of the trust agreement). It seems clear that the title to the corpus of the trust estate is vested in the said Guaranty Trust Co. of N. Y. We find nothing in the file indicating that the trust estate is being handled by the trustee in any manner as to give it, or any part thereof, a business situs in this state. Under §660.10, F. S., the said trust company was expressly prohibited from transacting a trust business in this state; this being true, there could be no separate business situs of the said trust estate or any part thereof in this state.

The above statutes, authorities and observations lead to a negative answer to the 1st above question. The trustee, by the trust agreement, is given the legal title and right of possession of the property of the trust estate, including all intangibles, to be administered by it for the benefit of members of the said retirement system. "It is provided in the plan that the contributions of the employers and the members (employees) are to be placed in a trust for the exclusive benefit of members, retired members and their beneficiaries." Membership in the retirement plan seems to cease where a member ceases to be an employee, at least until

such employee is eligible for retirement. It seems that a member leaving the employment of the power company may be entitled to a refund of contributions made to the trust fund by him. Upon the death of a member his contributions to the fund are paid to his nominee or to his estate. The rights of the members or employees in the trust fund are a beneficial interest and they are in the nature of *cestui que trustant*. They seem to have a present beneficial equitable estate, right or interest in the trust property (see *Wood v. Ford*, 148 Fla. 66, 3 So. 2d 490). Such an interest may be of such a nature that it may be subject to taxation at the residence of the *cestui que trust* (84 C. J. S. 240, §117).

Although the interest of the member or employee may have a present beneficial equitable estate, right or interest in the trust fund, such estate, right or interest, because of its termination should the member or employee leave the employment of the power corporation, its present value is somewhat uncertain until such member or employee has actually retired. If the member or employee leaves the employment of the power corporation prior to his retirement his interest in the fund would be the amount required to make refund of his contributions to the trust fund; however, should he remain in the employment of the power corporation until time for his retirement he would receive valuable retirement rights. His interest, right or estate in the trust fund, prior to his qualification for retirement, is in the nature of an inchoate right which might present difficulties in fixing its full cash value. This leads to a qualified affirmative answer to the 2nd question.

We, therefore, answer the 1st question in the negative and the 2nd question in the affirmative, with a warning that determining the full cash value of the member or employee in the trust fund will present difficulties and probably uncertainties as to such value fixed.

When an employee, who is a resident of this state, is retired under the said retirement system and begins to receive his retirement compensation, his retirement contract should be reported to the county tax assessor or the state comptroller, so that it may be determined whether the same is subject to taxation, as an intangible personal property, and if found taxable, the same should be assessed by the county tax assessor as other intangible personal property is assessed.

057-225—August 5, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY COMMISSIONERS, COMPENSATION, CONSTRUCTION OF §125.161, F. S. AND CH. 57-126 (§11.031, F. S.)**

To: *State Auditing Department, Tallahassee*

QUESTIONS:

1. Where a special county census, meeting the requirements of §125.161(2), F. S., was taken "prior to May 1, 1955," does such census determine the compensation of the county commissioners of such county?

2. Will Ch. 57-126, 1957, repeal §125.161(2), F. S., when it takes effect on Aug. 7, 1957?

Section 125.161, F. S., fixes the annual salary of the boards of

county commissioners of the several counties of the state "according to the population as shown by the *last preceding regular and special federal census*," in the amounts set out in the said section. Said section 125.161(2), F. S., defines the term "special census," as used in said §125.161, as meaning "any census conducted by the federal bureau of the census and the results of said census certified to the board of county commissioners of the county in which said census was taken *prior to May 1, 1955*." (Emphasis supplied.) This definition of "special federal census," as used in said §125.161, seems to limit the use of such special census to those taken "prior to May 1, 1955." Although the reference in said §125.161, F. S., seems to be progressive (State v. Daniel, 87 Fla. 270, 99 So. 804, text 809; State v. Ferrell, 130 Fla. 26, 177 So. 181, text 183) so that future regular federal census will be applicable, said §125.161(2) prevents the reference to special federal census being progressive and limits the use of special federal census to those taken prior to May 1, 1955. This may tend to raise constitutional questions; however, it has long been the practice of this office to leave constitutional questions to the courts and presume the constitutionality of the statute or law in question. Passing over possible constitutional questions, which are left to the courts, the 1st question is answered in the affirmative.

We now come to the effect of Ch. 57-126, upon said §125.161(2), F. S. This chapter requires that state legislation based on population be determined by the *last decennial statewide census*, and specifically provides that "no special county or district census shall be effective for any purpose other than to ascertain the population for the purpose of interpreting an existing law relating to additional judges of the circuit court *but no existing population or apportionment act shall be affected by a special census*." The title to the act is "An Act requiring all population acts and apportionments to be based upon the last decennial state census." (Emphasis supplied.) This act became a law on May 16, 1957, and will become effective on Aug. 7, 1957. It is an elementary rule of statutory construction that "a statute is not to be given a retroactive effect, unless its terms show clearly that such an effect was intended" (Miami v. Board of Public Instruction, Fla., 72 So. 2d 901, text 904 and authorities cited). "In the absence of anything in the statute to overcome it, the presumption is that a statute operates prospective only" (82 C. J. S. 990, §415; see also 50 Am. Jur. 494, et seq., §478). Unless the contrary is required in express terms, or by clear implication, an amendatory act will be construed prospectively and not retrospectively, at least with respect to substantive rights (82 C. J. S. 1005, §432). The rights of public officers to receive the salaries mentioned in §125.161, where determined by special census, would be affected if Ch. 57-126 is retroactive and applicable, and such salaries, although subject to change by the legislature, are substantive rights.

The title to Ch. 57-126 seems to express an intention to require that "all *population acts*" be based upon the last decennial census. The body of the act relates to acts "*based upon population*" and provides that "no special county or district census shall be effective for any purpose" other than determining the number of circuit judges, "but no existing *population . . . act* shall be affected by a special census." (Emphasis supplied.) In this state, through local use, the term *population act* has been used to identify those acts of

the legislature limited in operation to a single county which by its restricted population bracket is unlikely to apply to other counties and which in reality is a local act, and not to those statutes or acts *based on population* which apply generally throughout the state or to a logical classification of counties. Section 125.161, F. S., is an example of a statute based on population, as is Ch. 57-368, 1957, determining the compensation of the several sheriffs, and many of the acts appearing in part two of volume one of the 1953 and 1955 acts may be cited as examples of so-called population acts.

We are, therefore, of the opinion that Ch. 57-126, 1957, should be construed as prospective only and not retrospective; as prohibiting the application of special census taken in the future to any population act now existing or to any population act hereafter enacted, except where otherwise expressly provided in said act hereafter enacted, or to any statute based on population; as prohibiting the application of special census to any population act or statute based on population to which it was not applicable on the effective date of said Ch. 57-126. We do not think that it was the intention to withdraw the application of any special census to any existing population act or statute based on population to which it was applicable on the effective date of said Ch. 57-126.

Chapter 57-126, 1957, being prospective and not retrospective, has no effect on §125.161(2), F. S., which is applicable only to special censuses taken prior to May 1, 1955. The 2nd question is, therefore, answered in the negative.

057-226—August 5, 1957

CRIMES

CRIMINALS—REGISTRATION OF CONVICTED FELONS— CHS. 57-19 AND 57-371 (§775.13, F. S.)

To: *Joseph Y. Cheney, Florida Parole Commission, Tallahassee*
QUESTION:

Do the provisions of Ch. 57-19 (§775.13, F. S.) as amended by Ch. 57-371, relieve convicted felons who are probationers or parolees under the supervision of the Florida parole commission from the registration requirements of previously enacted statutes which apply only to certain counties and from the registration requirements of municipal ordinances?

Chapter 57-19 provides for the registration of persons convicted of felonies with the sheriff but gives them the option of registering with the Florida sheriffs' bureau instead. Section 5 of said chapter, as amended by Ch. 57-371 excludes certain persons from the registration requirements of said law, and among the persons so excluded is any person who:

Is a parolee or probationer under the supervision of the Florida parole commission, or is a probationer under the supervision of any county probation officer of this state, or who has been lawfully discharged from such parole or probation.

and §7 of Ch. 57-19 provides that:

All laws and parts of laws in conflict herewith are hereby repealed, provided that nothing in this section shall

be construed to affect any law of this state relating to registration of criminals where the penalties are in excess of those imposed by this act. (Emphasis supplied.)

Thus by the terms of said §7, previously enacted statutory provisions are repealed to the extent that they require the registration of convicted felons who are under the supervision of the Florida parole commission as probationers or parolees, unless such previously enacted statutory provisions provide penalties in excess of those imposed by Ch. 57-19, as amended by Ch. 57-371.

For example, I think that Ch. 18107, 1937, which requires that in counties having more than 150,000 population, persons convicted of felonies involving moral turpitude must register with the sheriff, is in conflict with Ch. 57-19, as amended by Ch. 57-371, to the extent that said Ch. 18107 requires the registration with the sheriff of persons convicted of felonies who are probationers or parolees under the supervision of the Florida parole commission; and since the penalties provided by Ch. 18107 are not in excess of those imposed by Ch. 57-19, as amended by Ch. 57-371, the former is repealed by the latter to the extent of such conflict.

For further example, Ch. 28470, 1953, requiring the registration of certain convicted felons in counties having a population of 450,000 or more, is in conflict with Ch. 57-19, as amended by Ch. 57-371, in that the former requires, but the latter does not require, the registration with the sheriff of convicted felons who are probationers or parolees under the supervision of the Florida parole commission, but there is no repeal of the former by the latter because, while both provide for a county jail sentence of not to exceed six months, the former provides for a greater fine (up to \$1,000) than the latter (up to \$500).

It follows that convicted felons who are probationers or parolees under the supervision of the Florida parole commission are relieved from complying with the registration requirements of Ch. 18107 but are not relieved from complying with the requirements of Ch. 28470.

As to municipal ordinances, I can speak only in general terms because I do not have before me any municipal ordinance requiring the registration of felons. If a municipal criminal registration ordinance requires that a convicted felon who is a probationer or parolee under the supervision of the Florida parole commission must register with a municipal officer, I do not think that such requirement conflicts with the provision of Ch. 57-19, as amended by Ch. 57-371, which relieves such probationer or parolee from registering with the sheriff under said statute but does not purport to relieve him from registering with municipal officers under municipal ordinances. A requirement of an ordinance that a convicted felon register with a municipal officer is a requirement not dealt with or prohibited by or in conflict with Ch. 57-19, as amended by Ch. 57-371, which does not in any way concern registration with municipal officers.

I have carefully researched and considered the question of when a municipal ordinance is repealed by a subsequently enacted statute and I am of the opinion that Ch. 57-19, as amended by Ch. 57-371, does not repeal but operates concurrently with a municipal ordinance which requires that a convicted felon who is a probationer or parolee register with a municipal officer. Consequently, I do not think that Ch. 57-19, as amended by Ch. 57-371, relieves a

convicted felon who is a probationer or parolee under the supervision of the Florida parole commission from the requirement of a municipal ordinance that a convicted felon register with a municipal officer even though he is a probationer or parolee under the supervision of the Florida parole commission.

057-227—August 5, 1957

TAXATION

AD VALOREM TAXES—EXEMPTIONS, CH. 57-761 AMENDING §192.112, F. S. AND CH. 57-778 AMENDING §192.111, F. S.—§192.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the exemptions from ad valorem taxes, granted by Chs. 57-761 and 57-778 to certain disabled ex-service-men in Florida, applicable to the 1957 tax assessments?

These two acts provide that they shall "take effect immediately upon becoming a law," and each of them became a law on June 20, 1957. We find nothing in the record of the proceedings of the legislature in considering and enacting these chapters indicating a clear intention that these chapters should be applicable to 1957 tax assessments. In the absence of anything in the statute or the journals and records of the legislature to the contrary, a statute enacted during a tax year will not be held retroactive so far as it applies to the part of a year already expired at the time of its enactment (see opinion 057-185, of June 25, 1957). Under §192.04, F. S., all real and tangible personal property is subject to taxation as of January 1st of the tax year. In *Simpson v. Hirshberg*, 159 Fla. 25, 30 So. 2d 912, *Hirshberg* was residing on certain real property and claiming it as his homestead on January 1st of the tax year, but on January 8th of the same year, sold, conveyed and delivered possession of the property to another. It was held that the status of the property, both as to taxation and as to exemption from taxation, was to be determined as of January 1st and not as of some other date.

Although the legislature was vested with the power and authority to make the acts in question retroactive to January 1st of the tax year and the exemptions applicable to the 1957 tax year, they did not so provide in the said chapters, and we find nothing in the legislative record of the said chapters indicating or showing such a legislative intent.

The above question must, therefore, be answered in the negative. Such exemption will be applicable for the first time to the 1958 taxes. Although constitutional questions may be indicated, it has long been the policy of this office to leave such questions to the courts; this being true, the constitutionality of these acts has not been considered or passed on.

057-228—August 6, 1957

TAXATION

TAXATION BY NEW MUNICIPALITY (ST. PETERSBURG BEACH) CREATED FROM TERRITORY OF ABOLISHED MUNICIPALITY AND OTHER TERRITORY—CHS.

57-1814, 26160, 1949; §192.04, F. S. AND §§20 AND 21, ART. VIII, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where one or more municipalities is abolished and a new municipality is created and established, from the territory of the abolished municipalities and other territory not previously incorporated, by legislation enacted after Jan. 1 or other tax day for the new municipality, may ad valorem taxes be assessed for the year of incorporation of the new municipality in the absence of express statutory provision?

Chapter 57-1814, abolished the municipalities of Pass-a-Grille Beach, Don Ce-Sar Place, Belle Vista Beach and St. Petersburg Beach, in Pinellas county, and created and established the municipality of St. Petersburg Beach, consisting of the territories of the said abolished municipalities and other territory not previously incorporated. The abolition and reincorporation were accomplished with a single act of the legislature. It is provided in and by the said chapter that the newly incorporated municipality succeeds to, owns, possesses and holds all rights in and title to all property, real, personal and mixed, of the said abolished municipalities, and all taxes, dues, claims, judgments, decrees and choses owned, possessed and held by the abolished municipalities at the time of abolition, and the obligations of such abolished municipalities are continued as obligations of the new municipality. The new municipality is given the usual powers of taxation of municipalities. Said chapter 57-1814 appears to have become effective on July 9, 1957, as of which date the abolition and reincorporation became effective under said chapter. So far as we are advised from the record, the new municipality was and is not required to pay any monetary consideration for the properties and assets of the abolished municipalities.

"When any municipality shall be abolished, provision shall be made for the protection of its creditors" (§8, Art. VIII, State Const.), and this provision is mandatory (*Humphreys v. State*, 108 Fla. 92, 145 So. 858; *State v. City of Pompano*, 136 Fla. 730, 188 So. 610). The legislature, when abolishing a municipality, must either provide protection for creditors by continuing collection of taxes by named officers or by creating a new corporation as successor (*State v. Goodgame*, 91 Fla. 871, 108 So. 836, text 840). Where one municipality is abolished and another created in lieu thereof the new corporation, to all intents and purposes, is the successor of the abolished one (*State v. Goodgame*, *supra*), and there is no interim of time between the abolition of the old and the creation of the new corporation (*State v. Couch*, 139 Fla. 353, 190 So. 723, text 728).

"Where property is annexed to a municipality after the date on which the situs of taxable property has been fixed by law for the tax year, it is not subject to tax for such year, unless the

charter of the town wherein the territory was before annexation has been repealed and the landowner has paid no taxes for such year to such town, in which case the annexing municipality may tax the land even though it was annexed after the date on which the situs of taxable property was fixed for the year" (62 C. J. S. 192, §79). "Where a statute imposing a tax is enacted during the fiscal year, it has been held invalid as retroactive so far as it applies to that part of the year already expired" (Cooley on Taxation, 4th Ed., 1156, §522; see also the same work, 1145-1152, §514). These authorities seem to declare the rule in the absence of express provision otherwise in the applicable statute or law.

Under the circumstances, and the provisions of said Ch. 57-1814, we feel that certain existing municipalities have been merged, with other unincorporated territory, to make up the new municipality and that the new municipality is in effect a continuation of the municipalities merged with the new municipality. Under §§20 and 21 (erroneously numbered §§13 and 14), Art. VIII, State Const.; §192.04, F. S., and Ch. 26160, 1949, all real and tangible personal property in Pinellas county, including both county, district and municipal taxes, are assessed by the county tax assessor as of Jan. 1 of the tax year. This rule seems applicable here unless legally changed by said Ch. 57-1814 or other law.

Unless otherwise provided by said Ch. 57-1814 or other local or special law, we feel that the taxable real and tangible personal property within the territory of the former and abolished municipalities, which have been merged into and became a part of the new municipality, may be assessed for municipal taxes for the tax year of 1957 notwithstanding the reincorporation, by said chapter 57-1814, after Jan. 1 which is the tax day for 1957 taxes; we doubt the authority of the new municipality to levy *ad valorem* taxes for the tax year of 1957 upon the territory not within the former municipalities and which did not come into any municipal area until after January 1, 1957. The certificates of total assessed valuations that would have been due to be sent by the tax assessor to the abolished municipalities except for the merger and consolidation should be sent to the new corporation. Unless the charter of the new municipality expressly provides for the assessment of the taxable property in the territory, not formerly incorporated but which was made a part of the new municipality, for 1957 municipal taxes, no certificate of valuations as to that area need be furnished to the new municipality until 1958.

This opinion is intended to set out the general rule under the circumstances and we have not examined the new municipal charter for any specific provisions relative to the question. The municipal attorney should advise the county tax assessor forthwith if there are any charter provisions expressly providing for the 1957 taxation of property in the territory not previously incorporated.

These observations answer the above question as well as the same may be answered generally, but leaving to the municipality the answer as to specific charter provisions.

057-229—August 7, 1957

TAXATION

MUNICIPAL UTILITY TAXES, EXEMPTIONS—CONSTRUCTION OF CH. 57-792 (§167.432, F. S.)—RECOGNIZED CHURCHES—§167.431, F. S.

To: City of Daytona Beach

QUESTION:

What does the term "all recognized churches," as used in Ch. 57-792, 1957, embrace?

Said chapter 57-792 exempts "all recognized churches" from "the payment of any utility taxes imposed by any municipality on any church property used exclusively for church purposes." It is evident that some of the language used in this chapter is ambiguous, if not inapplicable. The utility taxes imposed by municipalities (see §167.431, F. S., and similar statutes and laws) at the present time are excise taxes and not property taxes. Such taxes are imposed on the sale or purchase of utilities and utility services and not on property as such. We, therefore, construe said Ch. 57-792, as referring to utility taxes upon the sale or purchase of public utilities and utility services by recognized churches for exclusive church purposes.

We come first to the question of what are "recognized churches" within the purview of said Ch. 57-792. The term "church" is one of very comprehensive signification and usually imports an organization for religious purposes, for public worship of a supreme being or God. It is a word, however, which is used with varied significance, depending on the circumstances, attending its use. It may be said to consist of a body of believers, holding the same creed, observing the same rights, acknowledging the same ecclesiastical authority, regarded as the true representative, or as a branch thereof, of the church universal, and often confined to limits territorial or historical (45 C. J. S. 723, §2; 11 C. J. 762; 14 C. J. S. 1116; Webster's dictionary; Black's law dictionary).

The exemption is to "recognized churches," and the utility furnished must be used "exclusively for church purposes." We construe "recognized churches" to be those churches which have in the past and are now generally recognized by the public as churches, and for a church to be generally recognized we should look not to the immediate community where it is located but to the state or nation generally and if it is generally recognized as a church it should be treated as being within the act. Not every group or gathering of persons, although they may be religious people, constitute a church, but for them to constitute a church they must meet the test set out in the first part of this paragraph. Church purposes would seem to be those services and functions usually performed or carried out by the churches generally. The services and functions generally, and not of any particular church or congregation, should be used as the measure for determining church purposes.

These observations seem to answer the above stated question as well as the same may be answered generally.

57-230—August 8, 1957

CRIMINAL PROCEDURE

EVIDENCE, USE OF IN A COURT OF CRIMES WHEN SEIZED
BY VIRTUE OF VALID SEARCH WARRANT ISSUED FOR
VIOLATION OF MUNICIPAL ORDINANCE—§933.01, F. S.To: *Emerson Allsworth, County Solicitor, Fort Lauderdale*
QUESTION:

May evidence seized by virtue of a search warrant, issued by a municipal judge for the violation of a named city ordinance directing named peace officers of said city to search a residence located in said city, and made returnable to the municipal judge of said city, be admitted into evidence, over timely objection, in a trial in the court of crimes in and for Broward county, upon an information charging a violation of the laws of the state?

If the municipal search warrant was a valid one, issued and executed in compliance with the law governing such search warrants, then I see no reason why material and relevant evidence seized under the authority of such search warrant may not lawfully be admitted into evidence in a trial in the court of crimes.

It appears to me that the controlling question is as to whether the evidence was lawfully seized. It is not always necessary, in order for evidence gained by a search and seizure to be lawfully admissible, that the search and seizure have been made under authority of a search warrant issued by one of the judges specified in §933.01, F. S. For example, evidence gained by a search and seizure which is consented to is admissible despite the complete absence of a search warrant. For further example, evidence gained by a search and seizure incident to a lawful arrest is likewise admissible even though there be no search warrant. If evidence lawfully obtained by search and seizure in one of these situations is admissible, and it undoubtedly is, why isn't evidence also admissible when obtained by any other lawful search and seizure, as under a municipal search warrant? I see no reasonable answer to this question except an affirmative one.

As is said in 22 C. J. S. 1018, Criminal Law, §657-b(s):

* * * where the evidence is not procured as a result of an illegal search and seizure, and otherwise is competent and unobjectionable, it may be admitted. . . .

Therefore, it is my opinion that your question is properly answered in the affirmative insofar as concerns material evidence relevant to the issues in the court of crimes case.

057-231—August 8, 1957

INSURANCE

NONADMITTED CARRIERS—PREMIUM RECEIPTS TAXES,
REFUND—CH. 645, §§645.09, 215.26, F. S.To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Where an agent licensed under Ch. 645, F. S., collected and remitted to the state treasurer premium receipts taxes for policies issued by a nonadmitted carrier or carriers through said agent to a Florida municipality for the

years 1951 and 1952, and now makes application for refund of such tax, should such application be approved for payment?

Chapter 645 was originally Ch. 25414, Laws of Florida. It was first incorporated in Florida Statutes as §§627.55-627.70. Thereafter the sections were assigned the above chapter number.

Section 645.09, F. S., provides that when an agent duly licensed under said chapter issues coverage of a nonadmitted carrier on a Florida risk, he shall collect from the *insured* a premium receipts tax of 2% on the gross premiums charged, and that said agent "... is prohibited from absorbing such tax, or any part of his commission on the premium or, as an inducement for insurance or for any other reason, rebating all or any part of said tax or commission"; that such agent "shall be liable for and shall pay the commissioner such tax on or before March 1 of each year computed on gross premiums charged, subject only to deduction of any returned unearned portions of premiums, for the preceding calendar year. . . ."

We assume without question (which the insurance commissioner may verify from his records) that by March 1, 1952, this agent had accounted to the insurance commissioner for the tax on premiums collected from the municipality on coverage issued during 1951, and that by March 1, 1953, the agent had accounted to the insurance commissioner for the tax on premiums collected from the municipality on coverage issued during 1952, all as detailed in the application for refund attached to the request.

The application for refund states that it is in pursuance of §215.26, F. S. That section authorizes the comptroller to refund to the person who paid same, etc., any moneys paid into the state treasury constituting, "(a) An overpayment of any tax, license or account due; (b) A payment where no tax, license or account is due; and (c) Any payment made into the state treasury in error"; and there is the further provision that, "Application for refunds as provided by this section shall be filed with the Comptroller within one year after the right to such refund shall have accrued else such right shall be barred. . . ."

Opinion 053-156 (1953-54 B. R. 616) dealt with the question of whether a county school board purchasing insurance from a non-admitted carrier was liable for the payment of the premium receipts tax then required by §627.63, F. S., (now §645.09). A part of the answer set forth in the opinion is quoted: "Whether or not a county school board could be required to pay excise tax such as here found if the statute specifically included political subdivisions of the state (*other than municipalities*) in its coverage, is a question which we do not attempt to answer. It is felt, however, that in the absence of §627.63 specifically including such political subdivisions along with other insureds in relation to the 2% premium tax required, the statute should be construed as not being applicable thereto." (Emphasis supplied.)

The significance of the italicized words in parentheses is explained in copy of opinion 057-14 attached hereto. Opinion 053-156 did not purport to include within its coverage or deal with the status of municipalities in relation to this premium receipts tax. While opinion 057-14 distinguished between the legal natures of a county school board and a municipality, in pursuance of the authorities and reasoning in said opinion we concluded that a

municipality was not liable for the payment of such tax.

It is assumed that this application for refund derived from our holding in opinion 057-14.

It is unfortunate that, under the provisions of §215.26, time has barred the right for the refund claimed. Hence, in my opinion the insurance commissioner should not approve the same and the comptroller should not authorize payment of the refund requested.

057-232—August 8, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
LOCATION OF JAI ALAI FRONTONS WITH RELATION TO
EACH OTHER AND PARI-MUTUEL RACE TRACKS—
STATE RACING COMMISSION, CH. 550, §§550.05
AND 551.12, F. S.

To: *State Racing Commission, Miami*

QUESTION:

May the state racing commission issue a permit for the operation of a jai alai fronton within 20 miles of a horse or dog pari-mutuel race track already established and holding a permit?

Jai alai frontons were first authorized in this state under Ch. 17074, 1935, §10 of which provided in part that "all other pertinent provisions of chapter 14832, acts of Florida, 1931 (now appearing as chapter 550, Florida Statutes,) dealing with the powers, duties, and liabilities of the State Racing Commission and of the operators of horse or dog racing tracks not inconsistent with the express provisions of this act shall be construed to relate (to) and govern the State Racing Commission and/or the operators of any fronton under the provisions of this act as fully as if the same were herein expressly set out." This provision became a part of of §551.12, F. S., when the statutes were codified in 1941.

Said §551.12 was amended by Ch. 22614, 1945, and as amended provides in part that "all other pertinent provisions of chapter 550, dealing with the powers, duties and liabilities of the State Racing Commission and of the operators of dog racing tracks and dealing with the location thereof and with the issuance and granting of permits and licenses to conduct dog racing not inconsistent with the express provisions of this chapter (Ch. 551, F. S.) shall be construed to relate to and govern the State Racing Commission and the operators of any fronton and the location thereof and the issuance and granting of permits and licenses for the operation of frontons under the provisions of this chapter as fully as if the same were herein expressly set out; provided, however, that in no event shall any jai alai fronton be licensed to operate within twenty miles of a fronton already licensed . . ." (Emphasis supplied.) The title to said Ch. 22614 gave notice of an amendment relating, among other things, to the location of frontons. It is noted that §550.05, F. S., at the time of the enactment of said Ch. 22614 provided that "no permit shall be issued by the commission nor voted upon to conduct dog racing at a location within twenty miles of another location for which a permit has been issued or a racing plant located . . ." Doubtless the 20-mile limitation in §551.12 was taken from the 20-mile limitation in §550.05 as it existed in 1945.

Said section 550.05 was amended by Ch. 24349, 1947, so as to

provide, which statute remains unchanged, that "no application shall be considered and no permit shall be issued by the Racing Commission or voted upon in any county to conduct running horse races, harness horse races or dog races at a location within one hundred miles road travel via most practical route of another location for which a permit has been issued and a racing plant located" (Emphasis supplied.) There runs through said §§550.05 and 551.12 a studied design and purpose to separate pari-mutuel racing tracks from each other and jai alai frontons from each other but a similar objective to separate racing tracks from frontons is not apparent in the language of said sections.

It is our information, which the record of the commission probably would verify, that the commission, since the 1947 amendment, has construed the distance limitation in the racing statute as relating only to race tracks and the like limitation in the fronton statute as relating to frontons, and neither relating to the other. The commission appears to have construed the statutes as permitting a race track and a fronton within a distance of less than 20 miles of each other, in fact, as permitting them in juxtaposition to each other. This leads to a consideration of the effect of this construction by the commission upon our present construction of the said statutes. A contemporaneous construction of a statute by the agency charged with its administration and enforcement and the long acquiescence of the legislature in that construction is entitled to great weight, especially where that construction has been uniform and consistent (*Johnson v. State, Fla.*, 91 So. 2d 185, text 187; 82 C. J. S. 761-770, §359). Administrative interpretation of a statute is entitled to great weight and ordinarily will not be disturbed unless clearly erroneous or unauthorized (*Florida Industrial Commission v. Manpower, Inc., Fla.*, 91 So. 2d 197, text 199). "It is settled law that a construction placed on a statute by a state administrative officer . . . is a persuasive force and influential with the courts, when found not to conflict with some provision of the Constitution or the plain intent of the statute." (*McKinney v. State*, 83 So. 2d 875, text 876; *Volunteer State Life Ins. Co. v. Larson*, 147 Fla. 118, 2 So. 2d 386, text 387).

We have examined the question of the construction of said §§550.05 and 551.12, F. S., in the light of *Pompano Horse Club v. State*, 93 Fla. 415, 111 So. 801; *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, Inc., Fla.*, 37 So. 2d 692, text 694; *Rodriguez v. Jones, Fla.*, 64 So. 2d 278; *State v. Haggard, Fla.*, 67 So. 2d 205; *Volusia Jai Alai, Inc. v. McKay, Fla.*, 90 So. 2d 334 and other authorities, as well as the other authorities hereinabove mentioned, and do not find the construction placed on the statutes by the racing commission violative of either the state or federal constitution or the plain intention of the statute.

In the light of the language of the statute and the administrative construction placed on it and followed by the commission for several years last past, we answer the above question in the affirmative.

057-233—August 9, 1957

REGULATION OF PROFESSIONS AND VOCATIONS
REGULATION OF PSYCHOLOGISTS UNDER CH. 57-419
(CH. 490, F. S.)

To: *Richard W. Husband, Chairman, Florida State Board of
Examiners of Psychology, Tallahassee*

QUESTIONS:

1. Would the intent of §1, Ch. 57-419, or letter of Aug. 2, 1957, be interpreted as covering such a possible situation as someone trying to avoid the issue, and call himself by some vague title as "consultant" when he actually is rendering purely psychological services, such as by using tests which are composed, used, and interpreted by psychologists?

2. Section 2, Ch. 57-419 is aimed (in spirit) to control the activities of psychologists who offer their services on a fee basis. Specifically exempted are persons on various governmental payrolls, such as university teachers or county system school psychologists. Would you interpret that a psychologist employed 100% by a company would not need to be certified? (There are two such in Florida at present, one employed by Prudential Life and one by Great Southern Trucking—and no doubt more will come year by year.) Naturally, we assume that if such a person took on outside work on a fee basis, he would need to be certified; so would a college professor.

3. Suppose an applicant denied a certificate tried to sue us? Could he sue an individual, the board as a whole, or the state itself? What financial or other risk do we board members run? Would the state defend us?

4. Suppose a violation is suspected, either by an unlicensed person or an unethical act, to whose attention do we call this breach? (It is assumed that we would first try to straighten it out in as friendly manner as possible.)

5. Does the board have full authority under Ch. 57-419 to define experience of the individual? As a board we wish to interpret this to mean that the applicant has put in a 2,000-hour year under close supervision of a psychologist of recognized competence, so that like a medical intern his work can be closely scrutinized and any mistakes or errors corrected. By contrast, if a man worked wholly by himself, this would not be considered adequate, as there has been no check nor means of self-improvement.

6. Section 9, on reciprocity, worries us somewhat. Are we correct in assuming that we can enter agreements with other states on the basis that they are at least as strict as Florida in granting certificates? One reason for raising this question is that another southeastern state has been issuing certificates since 1953 and has given them with undue liberality; now they have tightened their requirements. Can we, if we choose to do so at all, agree in terms of their 1957 standards, and not

all certificate holders?

7. May the board in adopting a seal as provided for in §3(4) use part or all of the seal of the state amalgamating therewith or adding thereto an inscription pertaining to the Florida state board of examiners of psychology?

AS TO QUESTION 1:

It appears that the intent and the letter of §1(a), Ch. 57-419, would permit a person to call himself "consultant" or a "consultant on matters of the mind" and hang out a shingle using this word or phrase. If, however, such person claimed to be a "consultant" and then confided that he was a psychology or psychological consultant, he would then come within the purview of this act and be required to be licensed under its provisions. The wording of §1(a), Ch. 57-419, is so limited that if a person does not hold himself out as a "psychologist" by use of that word, "psychological" or "psychology," he does not come within the purview of the act. Section 1(a) falls down by use of the word "title." A better expression would have been "title and/or act." The entire section is based too much on titles and words and not enough on acts or activities. Admittedly, §1 is poorly worded, but it is difficult to imagine one holding himself out as a consultant without someone asking on what subject he is available for consultations. The minute he uses any of the three terms mentioned in §1(a), he comes within the purview of Ch. 57-419.

AS TO QUESTION 2:

In my opinion a psychologist, except as exempted by §2, Ch. 57-419, would have to be certified. Section 2 exempts "any psychological scientist employed in a *recognized educational setting or government-sponsored agency*." (Emphasis supplied.) I do not consider either of the companies mentioned by you, Prudential Life or Great Southern Trucking Co., as recognized educational settings or government-sponsored agencies. Likewise, I would not consider any other psychologist working full time on salary basis exempt from this act unless his employer fell within the definition of the two exemptions outlined in §2. Psychologists now practicing such as the two mentioned in your question should be certified without examination under the provisions of §6(2), assuming that they meet the educational and experience qualifications outlined in §5.

AS TO QUESTION 3:

No provisions in Ch. 57-419 provide for suit against the board. A disgruntled applicant could, of course, file suit in any of the three ways mentioned by you inasmuch as it is generally recognized that anybody can sue anybody. I am sure that you are primarily concerned with the possibilities of personal judgment as opposed to the technicalities of filing suit. It is my opinion that unless a single member or the several members of the board were grossly negligent or guilty of malfeasance in office no judgment would be personally assessed against them. The board, as any agency of the state, is immune from tort liability under the provisions of §22, Art. III, State Const. As to the question of what attorney would defend such an action, I suggest deferring that question until the time such legal assistance becomes necessary. If the board does not have sufficient funds and authority to hire its own attorney when necessary, then it would seem logical to make an appropriate re-

quest of the attorney general for necessary assistance.

AS TO QUESTION 4:

Breaches of this act should, as suggested by you, be settled as quickly and peaceably as possible at the discretion of the board. If this method of stopping violations of this act proves impractical, then it appears that the county solicitor or state attorney, whichever is appropriate, would be the proper law enforcing agency. It is noted from §7(e) that violation of this act is a misdemeanor and either of the above mentioned law enforcing agencies could adequately handle the situation.

AS TO QUESTION 5:

Section 4(1)(d) mentioned in your 5th question reads as follows:

(d) has had at least one (1) year's experience in the field of psychology, of a grade, character, and time distribution *satisfactory to the Board*. (Emphasis supplied.)

I interpret the last four words of subsection (d), "satisfactory to the Board" as giving the board sufficient discretion to set up certain standards and requirements to be met and fulfilled by candidates for a certificate during the one-year internship period, as the board may in its discretion deem necessary to insure that the candidates are sufficiently qualified. It is suggested that such regulations setting up the standards to be met by applicants for a certificate be filed with the rules and regulations division of the secretary of state's office.

AS TO QUESTION 6:

In question 6 you ask about reciprocal agreements and I again quote from Ch. 57-419, §9:

The Board shall be empowered to enter into reciprocal agreements with other states or territories of the United States which have certified or licensed psychologists.

This power does not seem to be in any way restrictive and the board is apparently authorized to enter into agreements with other states which the board in its discretion deems fair and equitable.

The 2nd sentence of §9 is as follows:

Any applicant for a certificate who has been examined by the Board of Psychology in any of the states or territories of the United States *which through reciprocity* similarly credits the holder of a certificate issued by the Board of Psychology of the State of Florida, may on the payment of a fee of fifty dollars, (\$50.00) and on filing in the office of the Board a true and attested copy of said certificate, showing the same *and also showing that the standards or requirements adopted and enforced by the said Board are equal to that provided by this act* shall without further examination receive the certificate; provided that such applicant has not previously failed at any examination held by the Florida State Board of Examiners in Psychology. (Emphasis supplied.)

The 1st italicized phrase apparently relates back to the reciprocal agreements provided for in the 1st sentence of this section. Therefore, an applicant could not apply unless he possessed a certificate from a state with which Florida had a reciprocal agreement, unless, of course he desired to take the Florida examination. The 2nd italicized phrase places a burden upon the

applicant to show by certificate that the standards or requirements adopted and enforced by the foreign board are equal to those provided for by this act. Therefore, such applicant would have to establish that he met generally the standards and requirements of the Florida board at the time he received his certificate from the foreign board. This would necessarily exclude persons admitted without meeting the present requirements under foreign savings and grandfather clauses except where the grandfather clauses were similar to the grandfather clause set out in §5 of this act.

It is advised that the board study the requirements of other states carefully before agreeing to any reciprocal agreements so that wholesale grants of psychological certificates to sub-standard applicants of other states under reciprocal agreements can be avoided and the safety and welfare of the citizens of Florida who seek professional advice from licensed psychologists will be protected. In line with this, you may desire to note an article entitled "Regulation of Psychological Counseling," appearing in Vol. 51, Columbia Law Review, p. 574 (1951), which is available locally, at least, at the Florida supreme court library.

AS TO QUESTION 7:

The secretary of state informs me that he has no objection to your use of the official seal as such on official stationery and like items. He states, however, that he is not authorized to allow changing or amalgamation of the state seal as such so as to make a new seal for the board of examiners of psychology similar to but not identical with the present state seal. The answer to your question is in the negative.

I hope the above information will assist you in your efforts to organize and develop the new Florida state board of examiners of psychology.

057-235—August 9, 1957

COURTS

JUSTICES OF THE PEACE, COSTS, AUTHORITY AND JURISDICTION—§§28.241(1), 58.04, 81.01, 81.26, 939.01, 939.02, 939.05, 939.14 AND 939.16, F. S.; CHS. 27209, 1951; 28838, 1953; §14, DECLARATION OF RIGHTS AND §9, ART. XVI, STATE CONST.

TO: *Kenneth R. Nix and Robert H. Eaves, Justices of the Peace, Riviera Beach*

QUESTIONS:

1. Does a justice of the peace have the authority to dismiss minor cases which are not felonies or public in nature, upon payment of costs by the defendant?
2. Is it true that the plaintiff, or complaining witness, always pays the costs in criminal and civil cases in justice of the peace courts?
3. Where a justice of the peace as committing magistrate issues a warrant to a peace officer returnable to a county court or criminal court of record, how is said justice reimbursed?
4. Where a justice of the peace binds a case over to another court and the case is subsequently dismissed,

does the county pay the justice of the peace any fee?

5. Have the population acts (Ch. 27209, 1951, and Ch. 28838, 1953) giving the justice of the peace courts in districts 3, 4 and 6, Palm Beach county, trial jurisdiction been ruled unconstitutional?

6. Does a justice of the peace have jurisdictional authority to take action where there is a disturbance of the peace outside the limits of a municipality?

I shall answer your questions in the order in which they are asked, furnishing former opinions of this office where such are in point.

AS TO QUESTION 1:

My predecessor in office answered this question in the negative in question 4 of attorney general's opinion 043-14. Substantially the same answer was given to a similar question in attorney general's opinion 050-575. There has been no substantial change in the law since the above mentioned opinions. Inasmuch as there is no constitutional or statutory authority for such a procedure, it is my opinion that it should be avoided.

AS TO QUESTION 2:

In answer to your 2nd question, I assume that you may have been relying on §§81.26(1) or 939.16, F. S., which require the plaintiff to give security for costs. The Florida supreme court in *Simmons v. State*, 71 Fla. 340, 71 So. 278 and *Osceola County v. State ex rel Newton*, 115 Fla. 5, 155 So. 119, held that §939.16 does not apply to crimes of a public nature.

In regard to criminal costs your attention is directed to §939.01, F. S., which says:

In all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person.

Section 939.02, F. S., provides that costs before a committing magistrate will be taxed against a convicted defendant. Section 14, declaration of rights, State Const. infers that a person convicted on final trial will be compelled to pay costs. Section 939.05, F. S., and §9, Art. XVI, State Const., provide authority for the county to pay fees when the defendant is insolvent.

In regard to civil actions, §58.04, F. S., says:

In all cases the party recovering the judgment shall recover also all his legal costs and charges, which shall be included in the judgment; but this section shall not be construed to relate to executors or administrators in cases wherein by law they are not liable to costs of suit.

(See *White v. Walker*, 5 Fla. 478 and *Martin v. Martin*, 157 Fla. 156, 26 So. 2d 183 at p. 184.) It perhaps should be pointed out that a plaintiff may be required to post the original filing fee under the provisions of §§81.01 and 28.241(1).

This question is answered in the negative.

AS TO QUESTION 3:

In a case where a justice of the peace makes a warrant returnable to a county court or criminal court of record, said justice should be reimbursed by the county under the provisions of §939.14, F. S., assuming that an indictment was returned or an information filed as required by that section. If no information is filed or indictment returned, then no costs, except the costs for executing the warrant, will be paid.

AS TO QUESTION 4:

Section 939.14, F. S., says that no fee will be paid to a committing magistrate by the county if no indictment is returned or information filed. If, however, a case was dismissed by the trial judge after the filing of an information or return of an indictment the justice of the peace would be entitled to collect his fee from the county under the provisions of this statute.

AS TO QUESTION 5:

I can find no Florida supreme court cases where the constitutional validity of the population acts mentioned in question 5 have been ruled upon. I suggest you check the files of your local circuit court for a ruling which may answer this question.

AS TO QUESTION 6:

Attorney general's opinion 056-296, dated Oct. 2, 1956, answered this question in the affirmative.

057-236—August 12, 1957

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX EXECUTIONS;
LIMITATIONS, CANCELLATION—CH. 199, §§199.22 AND
199.23, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a tax collector cancel an intangible personal property tax execution which has become more than seven years of age?

Under §199.22, F. S., as amended by Ch. 57-106, 1957, "where no tax execution is, or has been, issued or recorded on a delinquent personal property tax, said intangible personal property tax shall cease to be a lien on the real and personal property of the taxpayer, wherever situated, seven years from the date said intangible personal property tax becomes, or became, due; and any interested party may thereafter request that the tax collector cancel the same of record, and it shall be the duty of the tax collector to so do." The above quotation is made applicable to tax liens where no tax execution is, or has been, issued or recorded by the tax collector; nowhere in the statute is there any express authority given for the tax collector to cancel tax executions or the liens pursuant to which they may have been issued.

In *Gay v. Rutherford*, Fla., 73 So. 2d 60, the court, based upon language appearing in §199.23, F. S., that intangible personal property tax executions "shall have the force and effect of a recorded judgment at law against the delinquent taxpayer for seven years after the date of such execution," held the life of such executions to be "for only seven years from the date of their issuance and thereafter (they) were void and of no force and effect." In other words, the life of a tax execution issued under Ch. 199, F. S., is seven years. We find nothing in the original statutes or the 1957 amendments authorizing the cancellation of such tax executions by the tax collector, as do the 1957 statutes provide for the cancellation of such taxes when no tax execution is issued. This being true, it seems that we must answer the above question in the negative.

Although we do not think that the tax collector has any official duty or power to officially cancel the said tax execution, we

see no reason why he might not make a notation on the tax books referring to the holding by the court in *Gay v. Rutherford* in connection with the expired tax execution.

057-237—August 12, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
DISCOUNT CONSUMER FINANCING, CONSTRUCTION OF CH.**

519, F. S. AS AMENDED BY CH. 57-164

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are persons, firms and corporations, purchasing at a discount, promissory notes, conditional sales agreements, retained title contracts, and other securities, from dealers in personal property and received in connection with the sale of tangible personal property, subject to the provisions of Ch. 519, F. S.?

Chapter 519, F. S., as amended by Ch. 57-164 indicates its purpose to be the regulation of the making of loans of money or its equivalent in amounts of \$600 or less for a consideration. Promissory notes, conditional sales agreements, retained title contracts, and other evidences of indebtedness received in connection with a loan of money or the transfer of equitable or legal title to tangible personal property seem to be within the purview of the statute. This statute seems to relate primarily to the original transaction evidenced by the said promissory notes, conditional sales agreements, retained title contracts and other evidences of indebtedness, and not to the negotiation, assignment and transfer of such instruments.

Where a person, firm or corporation purchases, although at a discount, acquires such promissory notes, conditional sales agreements, retained title contracts and other evidences of indebtedness, by negotiation, purchase, assignment or otherwise, such persons do not appear to be within the purview of said Ch. 519, F. S., as amended; unless such acquisition is in connection with a scheme, device, subterfuge or plan to evade the application of the said statute (§519.05, F. S.). Whether or not the transaction amounts to a scheme, device, subterfuge or plan to evade the application of the said statute is one of fact to be determined from the applicable facts and circumstances.

The above question is therefore answered in the negative, where the transaction is bona fide and not a device, subterfuge or pretense to evade the application of Ch. 519, F. S., within the purview of §519.05, F. S.

057-238—August 12, 1957

LABOR

**APPRENTICES—JOINT APPRENTICESHIP COMMITTEE,
LABOR UNIONS—LIABILITY FOR INJURIES SUSTAINED
IN CONNECTION WITH APPRENTICE TRAINING PRO-
GRAM CONNECTED INJURY—CH. 446, F. S.**

To: *Burnis T. Coleman, Counsel, Florida Industrial Commission,
Tallahassee*

QUESTION:

Is the joint apprenticeship committee or the labor

union liable to suit in case indentured apprentices are injured while taking related training connected with their apprentice training programs?

Chapter 446, F. S., creates within the Florida industrial commission a department of voluntary apprenticeship, the purpose of which is to make available to the young people of Florida an opportunity to obtain training that will equip them for profitable employment and citizenship. An apprentice within the meaning of Ch. 446, F. S., is defined as follows:

... an employed person at least sixteen years of age who is engaged in learning a recognized skilled trade through *actual work experience* under the supervision of craftsmen, which training should be supplemented by properly coordinated studies of related technical and supplementary subjects; who has entered into a written agreement (hereinafter called an apprentice agreement) with an employer, an association of employers, or a local joint apprenticeship committee, providing for not less than four thousand hours of reasonable continuous employment for such person. (Emphasis supplied.)

There is also created an apprenticeship council which serves as the policy-making agency.

The department of apprenticeship is under a director who administers the provisions of Ch. 446, and in cooperation with joint apprenticeship committees, conditions and training standards are set up for apprentice agreements.

The local apprenticeship committees are appointed by the apprenticeship council in any trade or group of trades in a city or trade area whenever the apprentice training needs of such trade or trades justifies it. The duties of a local apprenticeship committee shall be to work in an *advisory capacity* with employers and employees in matters regarding *schedule of operations, application of wage rates and working conditions for apprentices*.

In view of the manner in which the joint committees are constituted, which is to act in an advisory capacity to assist the voluntary apprenticeship program, I do not believe the law places a liability upon the committee in case of injury of an apprentice. It naturally follows that the committee should exercise every effort to assist or recommend the most suitable, safe and proper working conditions possible.

In view of the manner in which the voluntary apprenticeship program is constituted, I believe that it is a function of the state and that the committee and employer act somewhat as agents of the state in carrying out the state function of approving, permitting and conducting apprenticeship programs. Accordingly, I do not believe the law intends to make the joint apprenticeship committee or the labor union liable to suit in case indentured apprentices are injured while taking related training connected with their apprentice training program. Your question is answered in the negative.

57-239—August 12, 1957

COURTS

APPEALS TO DISTRICT COURTS OF APPEAL—COMPENSATION OF CLERK—§28.241, F. S.

To: *Arthur W. Newell, Clerk Circuit Court, Orlando*

QUESTION:

What fees are payable to the clerk of the circuit court in connection with appeals to the district courts of appeal?

Section 28.241, F. S., relates "to the compensation of the clerks of courts for services performed in suits or proceedings in courts in the state," including the circuit courts and appeals to and from the said circuit courts. When said section was first enacted, as Ch. 26931, 1951, and when amended by Ch. 29749, 1955, there were no district courts of appeal. District courts of appeal came into existence on July 1, 1957, pursuant to Art. V State Const., as amended and revised, on Nov. 6, 1956, pursuant to house joint resolution 810, proposed at the regular session of the state legislature in 1955 and adopted at the general election of Nov. 6, 1956.

Said section 28.241(3) provides the fee therein named for the clerk of the circuit court for his services in connection with appeals to the circuit court and from the circuit court to the supreme court of Florida. The title to Ch. 26931, from which said §28.241 was derived, clearly shows an intention on the part of the legislature to fix the fees for clerks of the circuit courts for services performed in court suits and proceedings to, in and from such courts. The 1956 amendment of Art. V State Const., has substituted the district courts of appeal for the supreme court as the appellate court for many appeals formerly taken to the supreme court. In other words the jurisdiction of the supreme court, as it existed when §28.241 was adopted, has now been divided between it and the new district courts of appeal. The services formerly performed by the clerk in connection with appeals to the supreme court are the same as are now performed by him in connection with appeals to the district courts of appeal.

The purpose of statutory interpretation is to determine the legislative intent (*Overman v. State Board of Control*, Fla., 71 So. 2d 262; *State Department of Public Welfare v. Bland*, Fla. 66 So. 2d 59; *Hanson v. State*, Fla., 56 So. 2d 129) and the same rule is applicable in interpreting constitutional provisions. We do not think that the people of the state and the legislature, in connection with the amendment of Art. V State Const. and the enactment of statutes and laws in connection with the district courts of appeal, intended to change the rule of §28.241 as to the fees of the clerk in connection with appeals to the district courts of appeal, but intended that the rule previously followed as to appeals to the supreme court should also be followed as to appeals to the said district courts of appeal whose jurisdiction was largely taken away from the previous jurisdiction of the supreme court.

We, therefore, hold that the fees payable to the clerk of the circuit court in connection with appeals to the district courts of appeal are the fees mentioned in §28.241(3), F. S., formerly paid in connection with appeals to the supreme court.

057-240—August 12, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
RENTAL OF COURTHOUSE SPACE TO PRIVATE BUSI-
NESSES—PHOTOSTATIC COPIES OF PUBLIC RECORDS—
ELECTRICITY USED BY PRIVATE BUSINESSES FOR PHOTO-
GRAPHIC PUBLIC RECORDS—§§28.24 AND 119.03**

To: W. A. Wynne, Clerk of Circuit Court, Sarasota

QUESTIONS:

1. May a board of county commissioners rent space in the courthouse to private businesses?

2. May the clerk of the circuit court furnish photostatic copies of the daily recorded records to abstract and/or title companies for a monthly charge?

3. May the board of county commissioners or the clerk of the circuit court make a flat charge for electricity used for the operation of electrical equipment by abstract and/or title companies to photograph public records in the office of the clerk of the circuit court?

AS TO QUESTION 1:

We enclose herewith a copy of attorney general opinion 055-101 which seems to completely answer this question in the negative.

AS TO QUESTION 2:

Section 28.24, F. S., 1955, provides that the compensation of the clerk of the circuit court, as clerk or recorder, shall be entirely by fees, and, unless otherwise provided, shall be as follows: (A listing of specific fees for particular services performed by the clerk of the circuit court). This section further provides that the fee for making, by photo process, copies of any instrument recorded in the public records, per page of not more than 14" by 8½" shall be 75c. Thus, the fee for the clerk of the circuit court in making copies of the public records by photographic process is firmly established. The compensation for making copies by this process must be set forth in this section.

Your letter states that you contemplate making daily photostatic or microfilm copies of those instruments recorded each day and furnish them to the abstract and/or title companies for a monthly charge.

It is my opinion that if such copies are furnished, the provisions of §28.24, F. S., relative to fees for photographic copies must be complied with.

Question 2 is therefore answered in the negative.

AS TO QUESTION 3:

Section 119.03, F. S., provides:

In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public record, instruments or documents, any such person shall hereafter have the right of access to said records, documents, or instruments for the purpose of making photographs of the same while in the possession, custody and control of the lawful custodian thereof, or his authorized deputy. Such work shall be done under the supervision of the lawful custodian of the said records, who shall have the right to adopt and

enforce reasonable rules governing the said work. Said work shall, where possible, be done in the room where the said records, documents or instruments are by law kept, but if the same in the judgment of the lawful custodian of the said records, documents or instruments be impossible or impracticable, then the said work shall be done in such other room or place as nearly adjacent to the courthouse as may be, to be determined by the board of county commissioners of the said county. Where the providing of another room or place is necessary, the expense of providing the same shall be paid by the person desiring to photograph the said records, instruments or documents. While the said work hereinabove mentioned is in progress, the lawful custodian of said records may charge the person desiring to make the said photographs for the services of a deputy of the lawful custodian of said records, documents or instruments to supervise the same, or for the services of the said lawful custodian or the same in so doing at a rate of compensation to be agreed upon by the person desiring to make the said photographs and the custodian of the said records, documents or instruments, or in case the same fail to agree as to the said charge, then by the board of county commissioners of said county.

The above quoted statute provides the proper procedure for photographing public records by those persons having a right to inspect, take extracts or make copies from any public record. While the statute makes no mention of the use of electricity in conjunction with such photographing of public records, the provision of the statute giving the custodian of said records the right to adopt and enforce reasonable rules governing said work seems to be broad enough to permit the clerk of the circuit court to make some reasonable arrangement whereby the county of Sarasota may be reimbursed for the small amount of electricity consumed in the operation of electrical photographic equipment used for photographing of public records.

While the use of electricity, purchased by the board of county commissioners with county funds, for the operation of electrical photographing equipment belonging to a private business clearly is a use of public property for private purposes, I am of the opinion the provisions of §119.03, F. S., express an exception to the general rule that public property shall not be used for private purposes.

Said statute makes no provision as to what type photographic equipment may be used and it would appear to the best interest of all concerned that the most efficient type of equipment be used to photograph public records. Where the most efficient method of performing this task would be use of electrical equipment, §119.03, F. S., is broad enough to permit the collection of a reasonable fee for the electrical current used.

Question 3 is therefore, answered in the affirmative.

057-241—August 13, 1957

PUBLIC PROPERTY AND PUBLIC BUILDINGS

PUBLIC BIDS—CHECK OR DRAFT AS GOOD FAITH DEPOSIT—TIMBER SALE CONTRACTS—DOCUMENTARY STAMPS—§255.051, F. S.

To: *R. A. Bonninghausen, Florida Board of Forestry, Tallahassee*
QUESTIONS:

1. Are documentary tax stamps necessary on cashier's checks and bank money orders?
2. Are cashier's checks and bank money orders sufficient security for timber sales in lieu of a performance bond?
3. Is there some reason why a certified check is considered more security than a cashier's check or bank money order?

AS TO QUESTION 1:

Documentary tax stamps are not required on cashier's checks. This was established by attorney general's opinion 031-32, dated Sept. 24, 1931 (AGO 1931-1932, p. 831) and has been consistently followed by the comptroller's office. The above opinion stated:

A cashier's check is a check, draft, or other order for the payment of money drawn by the cashier of a bank upon either his own or some other bank, in which funds of his bank are deposited, and is not a written obligation for the payment of money as contemplated by the provisions and requirements of the act under consideration. Therefore, no tax is required on cashier's checks.

A bank money order is an instrument issued by an authorized officer of a bank and directed to another, evidencing the fact that the payee may demand and receive upon endorsement and presentation the amount stated on the face of the instrument. The issuing bank is solely liable on a bank money order. (State ex rel Babcock v. Perkins, 134 N. E. 2d 839, 842, 165 Ohio St. 185.) It is my opinion that a bank money order is in the same category as a cashier's check and no documentary tax stamps are required.

AS TO QUESTION 2:

Section 255.051, F. S., which was first enacted in 1953, provides:

Whenever any form of bid of the state or any county or municipality thereof or any department or agency of the state, county or municipality or any other public body or institution shall specify that a good faith deposit shall be made by way of a certified check accompanying such bid, such requirement shall be satisfied by the bidder depositing in lieu of such certified check a cashier's check, treasurer's check or bank draft of any national or state bank.

I believe the term "bank draft" as it is used in this section is broad enough to include bank money orders. Question 2 is, therefore, answered in the affirmative.

AS TO QUESTION 3:

A certified check, as was stated in opinion 042-32, dated Aug. 3, 1942 (AGO 1941-1942, p. 8), makes both the certifying bank and the maker liable. A cashier's check or bank money order makes liable only the issuing bank. Thus, a certified check is

greater security than a cashier's check or a bank money order. However, in light of §255.051, F. S., all three are now sufficient security.

057-242—August 14, 1957

TAXATION

VETERANS' OCCUPATIONAL LICENSE EXEMPTION— FRACTIONAL LICENSES—CONSTRUCTION OF §205.16, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the extent of the credit allowed a veteran by §205.16, F. S., on a required occupational license fee when the veteran makes application for a half-year license?

Section 205.16, F. S., provides that a disabled veteran shall be entitled to a credit of fifty dollars on "any license to engage in any business or occupation in the state." In opinion 046-448, rendered by my predecessor on Oct. 17, 1946, this provision was construed to permit a \$50 exemption on each license—municipal, county and state—required of the veteran to engage in the desired occupation.

Although §205.16, supra, does not specifically designate whether the exemption is to be prorated over a year, a reading of this section, whether in part or in its entirety, prompts the conclusion that the \$50 credit was intended to apply to a full year or annual license. Your attention is invited specifically to subsection (2) of such section which provides that whenever any "state, county or municipal tax as fixed by law shall exceed the sum of fifty dollars, the remainder of such license in excess of fifty dollars shall be paid by him in cash." (Emphasis supplied.) You will also note that subsection (3) of such section provides, among other things, that: "All licenses issued under this section shall be in the same general form, and shall expire at the same time, as other state, county and municipal licenses are fixed by law to expire." Such language can only imply an annual license. The general rule to be followed when construing a statute purporting to grant an exemption from taxation to a veteran is that the statute be construed strictly against the person claiming the exemption. See American Law of Veterans, 2nd Edition, §831, p. 592; 51 Am. Jur., Taxation, §549, p. 546.

In light of the above, it is therefore my opinion that if the veteran applies for a fractional license under §205.04, F. S., the allowable annual credit under §205.16, supra, should be prorated accordingly.

057-243—August 14, 1957

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS DEPUTY TAX COLLECTORS, COMPENSATION—§§199.18(3), 193.02, 193.46, 200.27 AND CH. 145, F. S.; §7, ART. VIII AND §27, ART. III, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Under §199.18(3), F. S., is the deputy tax collector, who makes the levies and effects collection of intangible personal property taxes due, entitled to the fees specified in the said subsection?

Under said §199.18(3), "the tax collector shall be entitled to the following fees for executing and collecting tax executions without sale . . . however, . . . if the tax execution is collected by levy and sale, the tax collector shall receive the same fees allowed by law to the sheriff; and provided, further, that all said fees shall be added to the amount of the total tax stated in such tax execution and shall be collected by the tax collector or his deputy from the taxpayer, and not from the county or state." In this connection we note §200.27, F. S., relating to the collection of tangible personal taxes, after making provision for the selection and appointment of deputy tax collectors, provides that "the deputy collector so appointed shall be entitled to the following fees, which shall be collected from delinquent taxpayers at the same time of the payment of their taxes . . ." The statute then sets out the amounts of the fees allowed. This provision, except for the amounts of the fees, is substantially identical with the latter part of §193.46, F. S.

Although the constitution (§7, Art. VIII) provides for assistant assessors of taxes, nowhere in the said constitution do we find any reference to or provision for deputy or assistant tax collectors. Except where otherwise expressly provided in the state constitution, all state and county officers must either be appointed by the governor or elected by the people (§27, Art. III, State Const.). Here the deputy tax collectors are selected and appointed by the tax collector and are under the direct supervision and control of the tax collector and may be discharged by him at any time. They are in the nature of office employees, and not public officers.

Section 193.02, F. S., requires that the tax collectors of the several counties prepare and submit, on or before July 1 of each year, to the state comptroller their budgets for the operation of their office for the ensuing year. When this budget is approved by the state comptroller it becomes the operating budget of the tax collector's office for the ensuing year. Budget commission statutes and laws (such as Ch. 14678, 1931, as amended by Chs. 57-465 and 57-470 and Ch. 21874, 1943 as amended) have been made applicable to the larger counties under which budgets are provided for county officers, boards and commissions. Usually these budget statutes fix and determine the amount to be paid or allowed by the county during the ensuing fiscal year by or for each and every county officer for salaries of employees and deputies and for supplies and other expenses for the conduct of his office (§§9 of Chs. 14678 and 21874, 1931 and 1943). Every such budget when adopted by the budget commission becomes final and has the force and effect of fixed appropriations determined by the authority of law which shall not be altered or amended except as may be provided by law.

Budget commission statutes are in force in Duval county where the above question arises. Laws of this nature have been upheld by the courts (*Sparkman v. County Budget Commission*, 103 Fla. 242, 137 So. 809; *Cary v. State*, 138 Fla. 679, 190 So. 2d 49). Under these budget commission statutes a budget would seem to be required fixing the expenditures of the office of county tax collector, which would have to include the sums to be paid deputy tax collectors, although the specific amounts would not seem to have to be budgeted.

The fees and commissions paid for the enforcement of tax executions for delinquent intangible personal property taxes, although earned through a deputy tax collector, would seem to be income of the office to be taken into consideration in determining "net income" under Ch. 145, F. S.

The above question is answered in the negative; unless the budget of the tax collector's office, duly approved by the state comptroller and by the county budget commission when so required, contains an item providing for payment to the deputy tax collector in the manner contemplated by the said question. All the above mentioned statutory and other provisions of law must be considered along with said §199.18(3).

057-244—August 14, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY SUPERINTENDENT, POLK COUNTY, COMPENSA-
TION—§230.302, F. S.—CH. 57-987 (H. B. 1495)**

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

Would the following section of house bill 1495, 1957 legislature, freeze the salary of the superintendent of public instruction of Polk county at \$10,000 regardless of the number of instructional units earned within the county during the immediately preceding fiscal year: "Provided however, nothing in this act shall be construed as changing the annual compensation of the superintendent of public instruction as fixed at the time this act becomes effective"?

Section 230.302, F. S., provides for the superintendent of public instruction of all counties with a population of less than 200,000 to be paid according to a formula based on the number of instructional units in the county during the preceding year. This would include Polk county.

Section 230.302 also provides, however, that no superintendent's salary shall exceed the highest salary established by law to be paid to the other highest paid county officer in his county.

According to the information given, Polk county has enough instruction units to pay its school superintendent more than \$12,000 under the formula fixed by §230.302, but the highest salary paid any other official in Polk county prior to July 1, 1957, was \$10,000.

House bill 1495 of the 1957 legislature, a population act, permits the annual salary of the county judge in Polk county to be \$12,000 if his fees are sufficient. According to the information you furnished, the county judge, based on the previous record of his office, will earn \$12,000. House bill 1495 also contains the following proviso:

Nothing in this act shall be construed as changing the annual compensation of the superintendent of public instruction as fixed at the time this act becomes effective.

In my opinion this act cannot be construed to repeal or modify §230.302, F. S., which fixes by formula the salary of the Polk county school superintendent.

The population act, assuming that it is constitutional, can only be construed as permitting the salary of the county judge of Polk county to be \$12,000 and the negative provision in the act to the effect that it shall not affect the salary of the school superintendent is not germane to the subject of the act nor in my opinion can it be interpreted to limit the provisions of §230.302, F. S., which permits the school superintendent to be paid an amount equal to the highest paid official in the county if the other qualifications of §230.302 relating to instructional units are met.

Your question is therefore answered in the negative.

057-246—August 19, 1957

CRIMES

PERJURY—DRIVER'S LICENSE EXAMINER—§§322.33, 322.32, 322.13, 322.27(1)(f), 837.01 AND 837.03, F. S.

To: *Aram P. Goshgarian, Assistant State Attorney, Miami*

QUESTION:

Where a driver's license examiner enters upon an application for a learner's permit his attestation that the applicant had taken an examination for said learner's permit on a date two days prior to the date upon which the application was filled out, and where the examiner well knew at the time (July 18, 1957) that the applicant had not taken such examination on the date alleged by applicant (July 16, 1957) is examiner guilty of perjury, as provided by §322.33, F. S.?

In the factual situation presented, the application contained the following language:

Affidavit of Applicant: I hereby certify that the information contained herein is true and correct.

Attest: _____

Examiner: _____

The applicant signed the statement and the examiner attested to the signature.

Section 322.33, F. S., provides that one who makes any false affidavit or knowingly swears or affirms falsely to any matter or thing required by Ch. 322, F. S., shall be guilty of perjury.

In your situation it is not shown that the examiner swore or affirmed to anything contained in the application and therefore he could not be properly charged with perjury. His attestation merely reflects that he witnessed the signature of the applicant. If you can establish that the examiner procured the applicant to swear falsely then the examiner would be liable for subornation of perjury, as provided by §837.03, F. S., in conjunction with §837.01, F. S.

The newly enacted statute reflected in Chapter 57-767, which became a law on June 19, 1957, authorizes examiners to administer oaths to applicants. Therefore, if on July 18, 1957, the examiner did administer the oath to the said applicant, and knowingly procured her perjured statement, you could charge him accordingly.

Another new statute, Ch. 57-759, provides for the suspension of any driver's license where one "has knowingly been a party to

the obtaining of a license by fraud or misrepresentation." This became effective on June 19, 1957.

Section 322.32, F. S., constitutes the act of knowingly concealing a material fact or otherwise committing a fraud in an application for a driver's license as a misdemeanor.

In conclusion, while it does not appear from the *facts presented*, that the examiner has committed perjury, he may have committed subornation of perjury if he actually procured the statement of the applicant and thereafter administered the oath.

If your proof will sustain the charge, the examiner can be legally charged with a misdemeanor and his license can be suspended.

057-247—August 19, 1957

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—DISPLAY OF RED LIGHTS ON PRIVATELY OWNED VEHICLES, FIREMEN—§§317.99 (CH. 57-781), 317.01, 317.04(4) AND 317.74(4), F. S.

To: Earl J. Langley, Sec'y Florida State Firemen's Ass'n, Inc., Chattahoochee

QUESTION:

Are regular firemen, as opposed to volunteer firemen, entitled to have red lights on their privately owned vehicles under the provisions of Ch. 57-781, or any other law?

Regular firemen are definitely not authorized to place red lights on their privately owned vehicles under the provisions of Ch. 57-781, which pertains only to volunteer firemen. Section 8 of Ch. 57-781, says "It shall be unlawful for any person who is *not an active fireman member of a regularly organized volunteer fire-fighting company or association* to display on any motor vehicle owned by him at any time, red lights as described above." (Emphasis supplied.)

The word "*volunteer*" as it appears in this act can only be construed in a restrictive sense and the above cited §8, in addition to the repeated use of the word "*volunteer*," appears to confirm this opinion.

I find no authority which would permit a regular fireman to equip his privately owned vehicle with red lights. Sections 317.01(1) and 317.74(4), F. S., define authorized emergency vehicles in like terms but neither section makes a provision for a regular fireman to equip his privately owned vehicle with red lights. There are a few isolated cases where regular firemen are also volunteer firemen. In these cases a regular fireman who is a member of a regularly organized volunteer fire-fighting company or association and as such meets the requirements of Ch. 57-781 is entitled to equip his privately owned vehicle with red lights as authorized in this act.

Apparently the reason for authorizing volunteer firemen to equip their privately owned vehicles with red lights and not extending the privilege to regular firemen stems from the fact that regular firemen are generally stationed at a designated firehouse during their tour of duty and it is expected that they will be taken to fires, in time of emergency, aboard authorized emergency vehicles, namely fire trucks, whereas the volunteer fireman must

make his way to a fire upon call from his home or place of business in his own automobile. The times when a regular fireman uses his privately owned vehicle to get to a fire are rare, whereas the volunteer uses his privately owned vehicle as frequently as he is called for duty as a fireman.

Necessity appears to be the key to the situation involved here and the necessity for volunteer firemen to continuously use privately owned vehicles as a means of transportation to an emergency scene appears to be the reason for extending the red light privilege to them. The answer to the above question is in the negative.

If the circumstances warrant continued and constant official use of privately owned vehicles by any particular group, or groups of regular firemen, then it is suggested that (1) the individuals involved petition the department of public safety or the municipal chief of police for permission to use red lights under the provisions of §317.01(1) or §317.04(4), F. S., or (2) contact their respective senators and representatives pertaining to special legislation similar to that enacted by Ch. 57-781.

057-248—August 20, 1957

INSURANCE

NONADMITTED CARRIERS—COMMERCIAL PROPERTY INSURANCE—CHS. 645, 629 AND 630, §§645.05(1)-(3), 645.08, 645.09, 645.12, 645.16(2), 629.09(2) AND 630.03(2), F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Was the policy of commercial property insurance, described below, issued in pursuance of the provisions of Ch. 645, F. S.?

In this opinion the large retail chain store operator obtaining the coverage will be referred to as "insured"; the nonadmitted carrier which issued the policy will be referred to as "insurer"; and the admitted insurer which submitted a rating plan relating to commercial property insurance, approved by the department prior to issuance, will be referred to as "admitted company."

The rather voluminous file which accompanied the request or which has been accumulated since receipt of the request is returned herewith.

The details of this policy are known to your department and no time is spent laboring their rather extensive provisions. The policy was issued Sept. 22, 1956.

The discussions our office has had with yours have evidenced that the questions involved are those dealt with in the headings below.

Chapter 645 is a surplus lines act. Those licensed under the chapter are referred to as agents. As a matter of fact, in a technical sense they are brokers. They represent no insurance company but the insured in Florida desiring the coverage. With these general remarks, attention is directed to the following items:

1. *Did the agent placing the coverage comply with §645.05(1) F. S.?*

This subsection provides, in effect, that an agent licensed

under the chapter "may place fire, casualty or surety insurance with a nonadmitted carrier under the following circumstances: (a) That such insurance placed is of a type and kind that the supervisory general agent is authorized to process or which the licensed agent under his resident agent's license is authorized to sell; and (b) That the supervisory general agent or the licensed agent is unable to procure such insurance from any insurer licensed to engage in business in this state, represented by such agent; and (c) That no insurer licensed to engage in business in this state but not represented by said agent, has offered or volunteered to accept such insurance."

A part of the file consists of a 78-page transcript of a meeting of the "Non-admitted Carriers Committee" in Tallahassee on Feb. 25, 1957. A reading of this will indicate discontent on the part of at least one person with respect to the conditions precedent to the placing of coverage with a nonadmitted carrier. That, of course, is a matter for the legislature and not for us.

It is sufficient here to say that the insurance representative of the insured here has made a full disclosure not only to representatives of this office but to certain members of your department concerning attempts to obtain this coverage from an admitted insurer. Those facts are known and no necessity exists here to enumerate them beyond mention of the admitted company and its rating plan for commercial property policies.

A commercial property policy is a recognized policy with its coverages in the field of insurance. We make that statement with assurance since prior to the issuance of the policy here the department had approved the rating plan of an admitted insurer for this type of policy with its various coverages. And at this point it is well to note that at the time of the issuance of the policy to the insured, that was the only rating plan for such type of policy which had been filed and which had been approved. That admitted insurer did not see fit to issue the coverage here involved.

It is quite apparent that the efforts of the insured through its insurance representative went beyond the rather meager requirements of §645.05(1) precedent to its obtaining of the coverage here from the insurer.

2. Did the coverage meet the requirements of §645.05(2)?

For convenience of discussion provisions of this subsection are separated as indicated.

Such insurance as cannot be so procured may be procured from nonadmitted insurers, provided the insurance is not written by a nonadmitted insurer at a rate lower than the tariff rate filed by the majority of admitted companies with the commissioner. . . .

The reason for such provision is apparent. Since an insured (other than certain political subdivisions) must pay a 2% premium tax (§645.09 F. S.) in addition to the premium required for coverage under this chapter, an observance of the quoted wording is required for control and the competitive aspect involved.

The words "by the majority of admitted companies" present no serious difficulty. If rates or rating plans providing for this coverage have been approved for one, two or a hundred admitted companies, with respect to the "rate" mentioned in the above-

quoted wording from §645.05(2), a majority controls. If there is only one company with such an approved plan, that company constitutes a "majority" within the meaning of the subsection. The policy here issued by the insurer to the insured appears to have been premised upon the rating plan of the admitted company, with one possible controversial aspect, which we mention.

On p. D-7 of the rating plan of the admitted insurer appears the following:

D. Deductible Credit Scale:—Applicable to Section

B. Loads:

\$ 75.00	5% to 10%
\$100.00	11% to 20%
\$250.00	21% to 25%
\$500.00	26% to 30%

Higher deductibles may be negotiated. The credit therefor shall be determined upon submission of all underwriting information requested.

The policy here has a "franchise clause" which is quoted: "Each claim for loss or damage under paragraph 4(a) through (f) inclusive, and 4(m), shall be adjusted separately and this company shall not be liable for any loss unless the adjusted amount thereof exceeds \$5,000, in which event this company shall be liable for the full amount of such adjusted loss." And there is a similar provision for each claim for loss or damage "under paragraph 4(g) through (l)" and related to the figure of \$500. Reasonably it appears to us that the "franchise clause" is a form of deductible subject to determination as contemplated by the quoted part of the admitted company's filing.

Beyond this, whether this coverage was issued for a premium premised upon rates conforming to the admitted company's approved plan is a matter quite apparently within the province of the rating division of the insurance department.

Attention is now directed to another portion of §645.05(2):

... nor providing coverage or subject to policy forms other than those authorized by the commissioner for insurers licensed to engage in business in this state; however, it is permissible to procure extended coverage or windstorm insurance at such tariff rates on such prescribed forms, using a deductible clause in excess of that filed by such admitted insurers.

One readily ascertains that the policy form here follows substantially the form of policy attached to the rating plan of the admitted company.

3. Were the provisions of §645.05(3) observed?

It is sufficient here to state that the subsection required copy of this policy to be filed, together with affidavit of the agent, in the office of the commissioner within 60 days of its issuance.

From information available it appears that without question there was prompt observance of this provision.

The insurance representative of the insured has construed our rating laws (Chs. 629 and 630, F. S.) to be read in *pari materia* as closely as provisions will permit with the provisions of Ch. 645. He has called attention to the provisions of §§629.09(2) and 630.03(2), F. S., to the effect that filings if not disapproved in 30 days shall be deemed approved; to the further fact that several months elapsed subsequent to the filing of the policy here with

the commissioner before its propriety was challenged; and concludes that in effect the policy has been approved. In the light of the purpose of the requirement for filing and the facts here involved, from the standpoint of equitable considerations we do not consider the position an unreasonable one at all; nevertheless, we do not feel that the provisions of our rating laws are applicable.

Should the rating division of the department conclude that the rates productive of the premium provided for the insured's policy are not within the reasonable and permissible limits of the approved plan of the admitted insurer, the question arises concerning what should be done, if anything.

The circumstances argue that all parties connected with issuance of this coverage acted in good faith. The commissioner is authorized to remove a nonadmitted carrier from his approved list only when he finds that such an insurer is not safe or solvent financially or has refused to pay just claims (§645.08, F. S.). It does not lie in the power of an agent licensed under Ch. 645 to cancel coverage obtained from a nonadmitted carrier, since such agent is not the agent of the carrier; and the facts here reasonably show such good faith on the part of the agent as to preclude threat of proceedings under §645.12, F. S. The efforts of the insured in connection with the obtaining of this coverage as above related reasonably remove any threat of "knowingly violating" any provisions of Ch. 645, as provided in §645.16(2). Where coverage is issued contrary to state regulations the general rule seems to be that such does not invalidate the policy (see §83, C. J. S. pp. 580-582).

057-250—August 19, 1957

RELIGIOUS FREEDOM

HOLDING RELIGIOUS SERVICES IN JAIL HALLS AND CORRIDORS—CONSTITUTIONAL GUARANTEE

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs' Ass'n,
Tallahassee*

QUESTION:

Will you furnish us with an opinion as to the authority and propriety of the sheriff or jailer in denying permission to religious groups to hold services or conduct other activities in jail corridors and hallways when no chapel facilities are available for use of such groups?

Freedom of religion and speech, as they are guaranteed by the federal and state constitutions, are not exempt from necessary regulations. The Florida supreme court, in *State ex rel Singleton v. Woodruff*, 13 So. 2d 704, said in part:

... In other words, one cannot be prohibited from strewing his religious wares up and down the street and from house to house; at the same time one would not be permitted to speak, practice, or distribute under the guise of religion that which endangers public morals or public health nor would one be permitted to speak, practice, or distribute his religious beliefs in places or at times that would endanger public safety and convenience. . . .

A religious service conducted in a hall or corridor may be inconvenient to normal functioning of a prison and could result

in unauthorized communication with a prisoner, endangering prison security. A sheriff, in his sound discretion, can make reasonable regulations to insure the safe detention of his prisoners and regulate prison activities.

Should the sheriff admit a particular religious group and a majority of the prisoners are opposed to its service, it should not be conducted. However, should the group be admitted by the sheriff and desired by the majority of the prisoners, I do not believe that the minority could exclude the service under the contention that they are a captive audience. In *Pollark v. Public Utilities Commission of District of Columbia*, C.A.D.C., 191 F. 2d 450, the court of appeals for the District of Columbia held that bus radios made a captive audience of a minority of the passengers and could be excluded. However, this was reversed by the supreme court in 366 U. S. 77, 69 S. Ct. 448, 453 L. Ed. 513, 10 A.L.R. 2d 608. The court there said that the minority could not dictate to the majority. This democratic process should also apply to prisoners in the county jail.

It is my opinion, therefore, that the sheriff, in his sound discretion, can exclude religious groups from conducting services in jail halls and corridors when he feels that such services will endanger the safe detention of his prisoners or will inconvenience his normal prison functions.

If the sheriff is willing to permit the religious group, but the services are contrary to the desires of the majority of prisoners, I believe they should be excluded, unless the services can be conducted for the minority in some place which is out of hearing of the opposing majority.

057-251—August 22, 1957

COURTS

SUBSTITUTION OF SMALL CLAIMS COURT JUDGE—

BREVARD COUNTY—§9, CH. 26509, 1951, CH.

30607, 1955—§§42.09, 38.09 AND 38.11, F. S.

To: *Samuel A. Harper, Judge, Small Claims Court, Merritt Island*
QUESTION:

What procedure should be followed for the substitution of the judge of the Brevard county small claims court inasmuch as the justices of the peace of that county have been abolished?

The Brevard county small claims court was established by Ch. 26509, 1951, Section 9 of Ch. 26509, which is patterned after §42.09, F. S., reads as follows:

Section 9. Whenever the judge of the small claims court shall be unable, from absence, sickness, or other cause, to discharge any duty whatever appertaining to his office, he may by order call in one of the justices of the peace of Brevard county to act in his place and stead, and such justice shall perform such duties and hear and determine all such matters as may be submitted to the judge of the small claims court.

Compliance with this section has been made impossible by the enactment of Ch. 30607, 1955, ratified by the electors of Brevard county on Nov. 6, 1956, which abolished all justices of the

peace in Brevard county as of Jan. 8, 1957.

Any attempt at giving §42.09, F. S., a more liberal interpretation was ruled out when the Florida supreme court, *In re Advisory Opinion to the Governor*, 58 So. 2d 319, held that §42.09, F. S., has no application to small claims courts established by special act, as is the case here.

Inasmuch as the obvious statutes do not or cannot govern in the instant case, this situation then appears to come within the purview of §§38.09 and 38.11, F. S. It will be noted, from p. 320 of *In re Advisory Opinion to the Governor*, supra, that the supreme court held that §38.11, F. S., in so far as it applies to disqualification of judges, was repealed by implication and superseded when §38.09, supra, was enacted.

It appears then that §38.09, supra, is the only applicable statute, and accordingly when disqualification or inability of the presiding judge of the small claims court of any county is brought to the governor's attention the governor has authority to assign another small claims court judge of comparable or greater jurisdiction to preside over such court. (*In re Advisory Opinion to the Governor*, 63 So. 2d 274).

In answer to your question, it is my opinion that where you are disqualified you should follow the provisions of §38.09, F. S. In the event the governor then has doubt as to the proper course for him to pursue, he may request a clarification from the supreme court, by way of an advisory opinion.

057-252—August 22, 1957

COURTS

WITNESS FEES FOR FEDERAL AGENTS IN STATE COURTS

To: *Lewis H. Tribble, General Counsel, State Comptroller's Office, Tallahassee*

QUESTION:

May federal agents testifying in state courts be paid more than the usual witness fees provided by statute?

This is in answer to the above question and to supplement my letter of July 15, which was in reply to your request of July 2.

As I promised, I am forwarding the information furnished by the bureau of internal revenue pertaining to witness fees for federal agents testifying in state courts. I believe the regulations forwarded by Mr. Tomlinson in the enclosed letter are self-explanatory.

It appears that the fees were authorized by appropriate court officials and have been paid to the witness in the instant case by agreement between the state and federal officials according to federal regulations. In some respects the federal regulations are not in harmony with the Florida Statutes, inasmuch as the state witness fee allowances in some cases are less than those allowed by the federal government. In the instant case, we shall presume that the treasury regulations have the force and effect of law and as such are superior to the laws enacted by Florida.

I realize that some federal agents may not have sufficient formal training in professional schools of higher learning to qualify as experts on that basis, but it appears that in some instances they may be more qualified in restricted phases of criminal

law than the layman and as such they may be entitled to expert witness fees for testifying in these areas where they have a superior knowledge. The fee in each of these cases should be left to the discretion of the court and it is assumed that the court will use this discretion wisely.

It is my suggestion that the testimony in question was probably well worth the fee asked by the federal agent when compared with the total cost of the trial in the instant case. It would appear that court officials may well be justified for allowing expert fees for this type of testimony.

It is a judicially recognized fact that the courts must continue to operate efficiently regardless of minor obstacles which may place themselves within the path of justice.

My predecessor in office rendered an opinion in keeping with this idea on April 5, 1947, at which time he held that an appropriation act could be exceeded to the extent necessary to pay the salaries of circuit court judges (A. G. O. 047-95, enclosure #1). The supreme court of Florida authorized the governor to sign warrants for salaries due circuit judges, state attorneys and official court reporters irrespective of inadequacy of general appropriation act. In re Advisory Opinion to the Governor, 154 So. 154. This opinion was followed in *State ex rel West v. Gray et al*, 74 So. 2d 114 at p. 132.

It appears in line with these opinions to hold that appropriate witness fees should be paid even in circumstances where the law fails to provide for such payment when in its discretion such testimony is necessary and justified.

There is a long line of cases which point out that the state and federal government should treat possible conflicts between their powers to produce as little conflict and friction as possible so as to operate in perfect harmony (*Penn v. Tollison*, 26 Ark. 545, 577; *Bute v. People of Ill.*, 68 Sup. Ct. 763, 333 U. S. 640, 92 L. Ed. 986). In an effort to establish and maintain harmony between the federal government and Florida, I suggest we interpret our laws to meet the request of the federal government where justice and discretion permit.

057-253—August 22, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—RIGHTS OF WIDOWS OF OFFICERS
OR EMPLOYEES—CONTRIBUTIONS—§§122.03,
122.08, CH. 57-363**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May the surviving spouse of a deceased state or county officer or employee complete the back contributions due the state by the decedent at the time of his death and thereby become eligible to receive benefits as his surviving spouse §122.08(4), F. S.?

Section 122.03(3), F. S., prior to the enactment of Ch. 57-363, provided that "any officer or employee claiming prior service under subsection (2) of this section shall make the required payment to the retirement fund within two years of *January 1, 1956*," which section, as amended by said chapter 57-363 now provides that "any

officer or employee claiming prior service under subsection (2) of this section shall make the required payment on or before the time of actual retirement." (Emphasis supplied.) Prior to the said 1957 amendment the officer or employee had the right to make the required payment at any time prior to *January 1, 1958*, after the 1957 amendment the officer or employee has the right to make the required payment on or before the *time of actual retirement*. Under §122.08(4), F. S., before and after its amendment by Ch. 57-363, "any state or county officer or employee who becomes eligible for retirement and continues to hold office or be employed shall be construed to have selected the option herein which will afford the surviving spouse the greatest amount of benefits. Should such officer or employee die before retiring, his surviving spouse shall be entitled to receive either the accumulated contributions of such officer or employee at the date of death or the reduced retirement compensation to which the surviving spouse would have been entitled to under such option, *calculated on the assumption that such officer or employee retired on the date of his death.*" (Emphasis supplied.)

Where a state or county officer or employee exercising his right, under §122.03(2), F. S., to obtain credit for prior service rendered the state or a county, further exercised his right to "make the required payment to the retirement fund within two years of January 1, 1956," and made payments thereon prior to his death on July 13, 1955, we are of the opinion that his estate may, prior to Jan. 1, 1958, complete the payments remaining unpaid in order that his surviving spouse may acquire the rights accorded to her under §122.08(4), F. S. We deem the provisions of subsections (2) and (3), as well as other subsections, of §122.03, F. S., to be in the nature of an offer by the retirement system through the state legislature which when accepted by an officer or employee makes a binding contract protected by the contract clause of the federal constitution. Should the estate of the decedent, or the surviving spouse as an interested party on behalf of the said estate, fail to make the required payments by Jan. 1, 1958, the rights under said §122.03(2) and (3), F. S., would seem to terminate and fix the rights of the surviving spouse or the beneficiary as of that date.

We are advised that the member of the retirement system in question, not at the time of his death having the required service credit to permit retirement without the credits to be acquired under and by virtue of §122.03(2) and (3), F. S.; this being true retirement compensation may be paid only from the time the necessary payments under §122.03(3) have been made.

The above question is, therefore, answered in the affirmative, provided, that retirement compensation may not commence until contributions for at least 10 years of service have been completed as permitted by §122.03(3), F. S. The rule hereinabove announced has no application to the amendments made by Ch. 57-363 as the facts upon which the opinion has been rendered occurred prior to the effective date of the said chapter.

057-254—August 23, 1957

COURTS

JUSTICES OF THE PEACE—FEES FOR ISSUANCE OF WARRANTS—§§939.14 AND 939.16, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

Is a justice of the peace entitled to be paid his fees by the county when he issues a warrant and delivers it to the constable or sheriff and the warrant is returned not executed:

1. When no further entries are made in the docket;
2. When he thereupon dismisses the proceeding;
3. When the charge was for an offense not of a public nature, the affidavit was not made by a law enforcement officer, and the justice of the peace did not require prepayment or a deposit for the costs, and an affidavit of insolvency and substantial injury was not made?

AS TO QUESTION 1:

In answer to your 1st question, it appears to me that it makes no difference whether or not entries are made in the docket as in the case described by you. Suppose, for example, that a justice of the peace issues a warrant for "X" and delivers it to the appropriate peace officer and that peace officer reports back that "X" is not to be found and reliable informants advise that "X" is out of the state. That warrant might be held for 10 years before "X" returns to Florida and is subsequently apprehended. In this case, the warrant is issued and returned unexecuted and no entries would be made in the docket because there would be no entry to make. If a justice of the peace issued such a warrant in good faith, I can see no reason why he would not be entitled to his fee for the issuance.

AS TO QUESTION 2:

In answer to your 2nd question, it would appear that the county is not liable for the costs, inasmuch as the committing magistrate has nullified his previous acts by dismissing the case. If there were sufficient basis, originally, for executing a warrant it would seem an unusual procedure to dismiss a case merely because a warrant was not immediately served. Dismissal of the case would allow the statute of limitations to run, whereas issuance of the warrant without dismissal would toll the statute of limitations and the alleged culprit could be arraigned if he were apprehended at a later date. Furthermore, §939.14, F. S., states that a county will not pay the costs when a committing magistrate binds a case over to an appropriate trial court and no indictment is returned or information filed. When the justice of the peace dismisses the case, he precludes all possibility of an indictment or information as a result of that warrant and the same result as that anticipated by §939.14, F. S., is reached.

In an opinion of my predecessor in office, 046-446, p. 134, B. R., 1945-1946, it was stated in substance that the county was liable for costs of the county judge in bona fide cases where he had jurisdiction to try said cases, where criminal offenses were charged, warrants issued, amount of bond endorsed, and the

warrants delivered to the sheriff without proceeding and after a lapse of time said cases were dismissed. The factual situation described in opinion 046-446 differs from the one here because there is *no showing* that the committing magistrate in the instant case *has trial jurisdiction* and there is no indication of an appreciable lapse of time between the issuance of the warrant and the dismissal of the case. For that reason, I do not consider this previous opinion analogous or controlling in the instant case.

AS TO QUESTION 3:

In answer to your 3rd question, it appears that the justice of the peace in question failed to fulfill his duty or obligation under §939.16, F. S., which says:

Prepayment may be required in courts of county judges, etc.—In all cases justices of the peace and county judges in this state shall require payment in advance or security for costs of process, service of the same, and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury to person or property shall issue without payment of costs.

It is realized that the Florida supreme court has modified this statute in some respects and lifted crimes of a public nature from the purview of this statute (see *Simmons v. State*, 71 Fla. 34, 71 So. 278; *Osceola County v. State ex rel Newton*, 115 Fla. 5, 155 So. 119). In cases where the crime is not of a public nature, the statute maintains its original effect. In the situation outlined in your question, the crime was not of a public nature, the party applying for the warrant was not a law enforcement officer and the justice of the peace did not require prepayment of costs or an affidavit of insolvency as required by law. Inasmuch as the justice of the peace in question apparently did not even subsequently meet the requirements of the law, I cannot hold that he is entitled to his fees. This question is then answered in the negative.

057-255—August 23, 1957

TAXATION

MUNICIPAL UTILITY TAX—EXEMPTIONS—CONSTRUCTION OF §167.432, F. S. (CH. 57-792)—CHURCH PURPOSES, SCHOOLS, ETC.

To: Mrs. Charles O. Robinson, Acting Clerk, Apalachicola
QUESTION:

Are parsonages, schools, convent buildings, and other buildings used for religious and church purposes, entitled to the utility tax exemption provided by Ch. 57-792?

Under said Ch. 57-792 recognized *churches* of the state are exempted from the payment of utility taxes imposed by municipalities for utility services *used exclusively for church purposes*. Reference is made to our opinion of Aug. 7, 1957 (057-229) where the question of what institutions and associations are included within the term "all recognized churches of the state." In brief, the question here presented is whether parsonages, convent buildings, church school buildings, and other buildings used by religious organizations may be said to be "used exclusively for church purposes." The term "church purposes" is not defined in said Ch. 57-792 or other applicable statute. One question that has arisen in this

connection is whether a meeting hall, next to the church, which is used for gatherings of persons not connected with the church may be said to be used exclusively for church purposes; however, in this connection no information was furnished us as to the nature and purposes of the gatherings mentioned. The fact that the hall used is next to the church does not of itself evidence use for church purposes, either in part or exclusively.

One of the few cases bearing upon the above question is *Scott Co. v. Roman Catholic Archbishop*, 83 Or. 97, 163 P. 88, text 91-2, where the court remarked, "That the erection of a convent may fairly be termed a 'church purpose,' which is the term used in the dispensing clause of the restriction. There is a broad distinction to be drawn between this phrase and the words 'for the erection of a church.' A building may be erected for church purposes other than those connected with divine worship. The word 'church' applies not only to a building used for worship, but to any body of Christians holding and propagating a particular form of belief, as, for instance, the Baptist Church, the Methodist Church, or the Catholic Church; and any building intended to be used primarily for purposes connected with the faith of such religious organization may be said to be used for church purposes. It is a matter of universal, and therefore judicial, knowledge, that associations of nuns, sisters of charity, and the like are as much a part of the organization of the Catholic Church as its priesthood, and that convents are as much a part of its organization and church policy as church buildings; and in this sense the erection of a convent is as much a church purpose as a house of general worship. In the case of *Craig v. First Presbyterian Church of Pittsburgh*, 88 Pa. 42, 32 Am. Rep. 417, the question was whether a building intended for the sessions of a Sunday school, ordinary lecture services connected with the church, social gatherings, and fairs held for the purpose of raising funds for missionary purposes, with occasionally a 'plain tea' for the benefit of those who attended from a distance was a 'religious purpose.' The court held that it was" See also *Board of Zoning Appeals v. Wheaton*, 118 Ind. App. 38, 76 N. E. 2d 597, text 601; *Re Geppert's Estate*, 75 S. D. 96, 59 N. W. 2d 727, text 731; *Trustees of New Hampshire Conference v. Sandown*, 87 N. H. 47, 173 A. 805. See also "Religious Purposes" in 36 Words and Phrases 791 and supplement.

In *Trustees New Hampshire Conference v. Sandown*, *supra*, certain property held and used by the conference for a superannuates' home for retired preachers of the conference was held to be property used for *religious purposes*. The term "church" has been defined as a religious society founded and established by Jesus Christ (Black's law dictionary); a body of communicants gathered into church order (*Stebbins v. Jennings*, 10 Pick. (Mass.) 193;) a body of Christians united under one order or form of government (*McNeilly v. First Presbyterian Church*, 243 Mass. 331, 137 N. E. 691, text 694;) a congregation (*Trustees Pencader Presbyterian Church v. Gibson*, Del., 22 A. 2d 782, text 787-8); a church house (*Combined Congregations v. Dent*, 140 F. 2d 9, text 10); place where persons regularly assemble for religious worship (*Stubbs v. Texas Liquor Control Board*, Tex. Civ. App., 166 S. W. 2d 178, text 180).

In the light of the above mentioned authorities we feel that the term "used exclusively for church purposes" has a broader

meaning than the use of the church auditorium for Sunday sermons or preaching services, but extends to such services as the Sunday school services, the young people's Sunday services in the church, and other services in the church directly furthering the religious purposes of the congregation. Parsonages used as a part of the church, whether on the church ground or not, when furnished the pastor or pastors of the church without cost of any nature including the utility services contemplated by Ch. 57-792, would seem to be an adjunct of the church, whether the utility services be furnished through the meter of the general church buildings or by a separate meter; however, if the occupant of the parsonage is required to furnish his own utilities we doubt that such utilities would be within the exemption of Ch. 57-792. Convent buildings, used for the purposes mentioned in *Scott Co. v. Roman Catholic Archbishop*, supra, would seem to be within the statute so that utility services furnished them would be within the statute. Church schools, which are the equivalent of the public schools of the state and counties, do not appear to be used for a church purpose within the purview of the said statute. We doubt that a jointly metered church and school account would be exempt unless the services furnished each could be readily segregated and billed separately. A meeting hall next to a church used for nonchurch service gatherings would not seem to be entitled to the exemption.

We, therefore, hold that utility services furnished by municipalities to parsonages, church schools, convent buildings, and other buildings and equipment of or connected with churches are exempt from the utility taxes mentioned in chapter 57-792 provided they are used exclusively for church purposes as defined herein.

057-256—August 26, 1957

CIVIL PRACTICE AND PROCEDURE

VALIDATION OF BONDS—EFFECT OF 1957 AMENDMENT TO §75.11, F. S. ON FEE OF CLERK OF CIRCUIT COURT FOR EACH BOND VALIDATION AS AUTHORIZED BY §28.24, F. S.

To: *J. Alex Arnette, Clerk Circuit Court, West Palm Beach*

QUESTIONS:

1. Under the provision of Ch. 57-300, is the clerk of the circuit court required to sign the validation certificate appearing on each bond of a particular bond issue?

2. Is the clerk of the circuit court entitled to a validation fee as provided by §28.24, F. S., for each bond certified?

AS TO QUESTION 1:

Section 75.11, F. S., 1955, provides:

Bonds or certificates, when issued under the provisions of this chapter, shall have stamped or written thereon, by the proper officers of such county, municipality or district issuing the same, the following: 'Validated and confirmed date when such decree was rendered and the court in which it was rendered,' *which shall be signed by the clerk of the circuit court in which the decree was rendered, which entry shall be original evidence of said decree in any court*

of this state.'" (Emphasis supplied.)

Chapter 57-300, amending §75.11, F. S., 1955, provides:

Bonds or certificates, when validated under the provisions of this chapter shall have stamped or written thereon, by the proper officers of such county, municipality or district issuing the same, a statement in substantially the following form: 'This bond is one of a series of bonds which were validated and confirmed by decree of the Circuit Court of the . . . Judicial Circuit of the State of Florida, in and for . . . County, rendered on . . . 19 . . .'

A copy of such decree, certified by the Clerk of the Circuit Court in which the decree was rendered, shall be original evidence of such decree in any court in this state. It is well settled that:

When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." (Ross v. Gore 48 So. 2d 415; 82 C. J. S. Sect. 322(b)(2)).

Prior to amendment, by Ch. 57-300, §75.11, F. S., 1955, made the entry of the clerk of the circuit court's signature, on each bond of a validated issue, mandatory, as such entry was original evidence on the question of whether or not a particular bond was one of a certain validated bond series.

By the enactment of Ch. 57-300, amending §75.11, F. S., 1955, the legislature has removed the necessity of the signature of the clerk of the circuit court on each bond of a validated bond issue. Under the provisions of said amending law, not only is the clerk of the circuit court's signature no longer required but the provision as to original evidence regarding a particular bond of a validated bond issue has been changed.

In Ch. 57-300, the legislature has provided that a copy of the validation decree, validating a particular bond issue, when certified by the clerk of the circuit court in which the decree was rendered, shall be original evidence of such decree in any court in this state. Thus, the result accomplished by the entry of the signature of the clerk of the circuit court on each bond of a particular validated issue is now performed by a single certified copy of the decree validating such bond issue.

The language of Ch. 57-300, amending §75.11, 1955, is clear and unambiguous and it is my opinion that the above interpretation accomplishes the legislative intent and purpose in enacting said amendment of §75.11, F. S., 1955.

Question 1 is answered in the negative.

AS TO QUESTION 2:

Section 28.24, F. S., 1955, provides a fee of 25c each to be paid to the clerk of the circuit court for validating certificates on any authorized bond. This provision of §28.24, F. S., although not expressly repealed, has become inapplicable, for the provisions of Ch. 57-300, removes the mandatory function of the clerk of the circuit court to which it applied. The clerk is not prohibited from signing the certificates when so requested.

Question 2 is, therefore, answered in the negative; unless he signs the certificates upon request.

057-257—August 27, 1957

COURTS

SMALL CLAIMS COURT CREATED BY CH. 25137, SPECIAL ACTS OF 1949—SERVICE OF PROCESS BY CERTIFIED MAIL—§1.01(13), F. S. (CH. 57-98).

To: *J. Tom Watson, Justice of the Peace, Lakeland*

QUESTION:

May a small claims court process be served by certified mail in lieu of registered mail as provided for by Ch. 25137, 1949?

Chapter 57-98, 1957, which supplements §1.01, F. S., the definition section, provides that "in construing these statutes and each and every word, phrase or part hereof where the context will permit; the words 'registered mail' shall include certified mail with return receipt requested."

With an end toward uniformity throughout the state judicial system in mind, it would seem logical to assume that we could look to the definitions contained in the general statutes in determining the latitude of special acts, especially where the same legislative body enacts both the special and general law.

Therefore, it is my opinion, in view of the new act (Ch. 57-98) that certified mail, return receipt requested, is now acceptable for small claims process as mentioned in Ch. 25137 and §42.10, F. S., as well as other process which the law previously specified had to be delivered by registered mail. All previous opinions of this office pertaining to this matter are modified to come into conformity with the new act mentioned herein and this opinion.

057-258—August 28, 1957

PUBLIC LANDS AND PROPERTY

TRUSTEES, INTERNAL IMPROVEMENT FUND—CH. 57-362, GUARANTEE TO PURCHASERS THEREUNDER.

To: *Van H. Ferguson, State Land Agent, Department of Agriculture, Tallahassee*

QUESTION:

May the trustees of the internal improvement fund, upon purchase by an upland owner of submerged lands under Ch. 57-362, bind themselves and their successors in office not to sell submerged lands or permit filling or dredging of submerged bottom lands lying outside of and beyond the established bulkhead line?

As was pointed out in opinion 057-215, dated July 30, 1957, Ch. 57-362, 1957, by its provisions, vests title to all sovereignty and submerged bottom lands as defined in §1 thereof in the trustees of the internal improvement fund. In order to ascertain the powers and duties of the trustees with reference to said lands we must look to this act.

Adequate protection is afforded an upland owner as to lands lying between the ordinary high water line and the established bulkhead line, for he alone may become the purchaser (§1). When it is proposed to change an established bulkhead line notice must be given the upland owner of land lying within 1,000 feet of the island or submerged land proposed to be conveyed thereby af-

fording him the opportunity to be heard. Judicial review is also provided for in said act (§2).

The upland owner has no pre-empted right to acquire lands beyond the bulkhead line. The trustees alone control these submerged bottom lands and islands and are charged with the responsibility of managing and administering them to the best public interest.

The limitations of the act pertaining to filling do not apply to the extension of land of a state, county, city or other political subdivision where it is the riparian upland owner and the land is held "... exclusively in a governmental or proprietary capacity for a municipal, county, state or public purpose. ..."

The trustees may not bind themselves and their successors in office in perpetuity by attempting to covenant with an upland owner purchasing submerged lands that they will not sell or otherwise dispose of other lands under their control. They would thereby be attempting to divest themselves of a discretion granted by the act and such action could in the future prove "contrary to the public interest." Actually, there will be instances where it will be in the public interest for the trustees to grant permits for dredging and filling or make sale of lands; for example, for construction of causeways and the like. The question is answered in the negative.

057-259—August 28, 1957

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—DIVISION "B"—RIGHTS—§§122.01, 122.20, 122.21-122.33 AND FORMER CHS. 121 AND 134, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Do members of the state and county retirement system waive the rights retained for them by §122.01(3), F. S., when they elect to become members of division "B" of said retirement system?

Chapter 57-382, 1957, amended Ch. 122, F. S., by adding a 4th subsection to §122.01 and adding additional §§122.21-122.33, inclusive, providing for and setting up an additional division in such retirement system to be known and designated as division "B." Section 122.01(3), F. S., has been retained as a part of the revised retirement system, such subsection provides as follows: "The rights of members of the retirement systems established by former chapters 121 and 134, Florida Statutes, shall *not be impaired*, nor shall their *benefits be reduced* by virtue of any part of this chapter." (Emphasis supplied.) This subsection has been retained as a part of the revised retirement system. Although added §§122.21-122.33, inclusive, of the said statutes, control as to division "B" and membership therein, it is noted that §§122.01-122.20, inclusive, of the existing statutes were made applicable to division "B" in relation to "administration . . . and to duties, rights, privileges and benefits of members of" said division "B." "The relevant provisions of sections 122.01 to 122.20, inclusive, . . . fixing or relating to eligibility for retirement, retirement compensation, or other benefits payable to members or for the account of members" in

division "A" "shall apply with equal force and effect to members of" division "B" (§122.28, F. S.).

For said §122.01(3), F. S., to be applicable, a state or county officer or employee must have been a member of either the state or the county retirement system (Chs. 121 and 134, F. S.), on July 1, 1955, the effective date of chapter 29801, 1955, now appearing as §§122.01-122.20, inclusive, F. S. Any person being a member of either of said retirement systems on said July 1, 1955, is presumed to have made the contributions to the retirement fund required by the applicable statute, and having made such contributions doubtless acquired a vested interest in such fund in accordance with the formula for retirement pay set out in said statutes (See Advisory Opinion, Fla., 82 So. 2d 494, text 497-8; *State v. Lee*, 147 Fla. 37, 2 So. 2d 127, text 133). The rights preserved by said §122.01(3), F. S., are those acquired by members of the retirement systems established by Chs. 121 and 134, F. S., now merged into Ch. 122, F. S. For example, under said Chs. 121 and 134, F. S., members with 30 years of state or county service were permitted to retire without regard to their age; under Ch. 122, F. S., this provision was deleted. This is one of the rights preserved by said §122.01(3), F. S. In other words, §122.01(3), creates no new or additional rights, but merely preserves rights already acquired. Should a member whose prior rights are preserved by said §122.01(3), make any election which would give him rights in conflict with the rights so preserved there would be a presumption of a waiver of the rights due him under said §122.01(3).

We doubt that a member may be said to have waived any of the rights preserved by said §122.01(3), to him until he has made some election, under the terms of Ch. 122, F. S., as extended by Ch. 57-382, 1957, contrary to or in conflict with his rights under said Ch. 121 or 134, F. S.

Under the state (Ch. 22831, 1945) and county (Ch. 22938, 1945) officers and employees retirement statutes of 1945, provision was made for retirement at the age of 60, after 10 or more years of credited service with the state or county. Ch. 23958 and 23959, 1947, added another retirement class to 1945 state and county officers and employees retirement statutes, by adding a provision for retirement regardless of age after 30 or more years of credited service with the state or county. The said 1945 acts were further amended by Chs. 28174 and 28175, 1953, by adding what appeared as subsections (3), (4), (5), (6), (7) and (8), of §§121.05 and 134.05, F. S., giving members of the state and county officers and employees retirement systems the right, at any time prior to the receipt of their first monthly retirement compensation, to elect to receive a reduced compensation for which reduction they are (a) guaranteed a return of all contributions, as provided in subsections (3) of said §§121.05 and 134.05, or (b) have provision made so that his or her spouse, upon the death of the retired officer or employee, will receive retirement compensation during the remainder of his or her life should they survive the retired officer or employee. These elections appear to have been available to either class of employees above mentioned. These provisions were in full force and effect when Ch. 29801, 1955, consolidating and revising Chs. 121 and 134, F. S., became a law and took effect. Under §25 of said Ch. 29801, "the rights of members of the retirement system established by chapters 121 and 134, Florida

Statutes, shall not be impaired nor shall their benefits be reduced by any part of" said Ch. 29801. This provision now appears as §122.01(3), Florida Statutes.

The main difference between former §§121.05 and 134.05, F. S., and consolidated §122.08 of the present statutes is the *deletion* of the right to retire after 30 years service without regard to age, and the addition of a provision for retirement at the age of 55 (§122.08(2), F. S.). Although the right under §§121.05 and 134.05 to officers and employees to retire after 30 years or more of state or county service, or both, were deleted by Ch. 29801, 1955 (Ch. 122, F. S.) such rights were preserved, by §122.01(3), to all members of the retirement system on the effective date of the said 1955 enactment. We come now to the question of possible waiver of such rights to retire after 30 years service without regard to age by an election to become a member of division "B" of the retirement system as provided by Ch. 57-382, 1957. The relevant provisions of §§122.01-122.20, inclusive, of the Florida Statutes, "fixing or relating to the eligibility for retirement, *retirement compensation*, and other benefits payable to members or to the account of members" in relation to division "A" of the system applies with full force and effect to division "B" with certain exceptions. One of these exceptions is that members of division "B" will receive retirement compensation to the effective date of their social security coverage at the same rate as do members of division "A," but after the effective date of their social security coverage their retirement compensation from the state will be on the ratio of one and one-half to two; that is the state compensation after the effective date of the social security coverage will be 75% of the compensation paid members of division "A." In addition to this state compensation, the members of said division "B" will be eligible for social security coverage when they attain the proper age.

Members of the retirement systems provided by Chs. 121 and 134, F. S., on the effective date of Ch. 29801, 1955, by reason of §122.01(3), F. S., acquired the right to retire after 30 years of service regardless of age, as was provided in and by said Chs. 121 and 134. This right has been fixed and may not be taken away, at least so long as §122.01(3) remains in force and effect. We construe Ch. 57-382 as authorizing the transfer of persons under said subsection (3) to division "B" of the retirement system, provided no person by such transfer may acquire rights detrimental to other members. So long as the rights acquired by reason of such election have no more of an impact upon the retirement fund than would retirement under Chs. 121 or 134 after 30 years of service without regard to age, it would seem that other members would not be injured.

We, therefore, answer the above question in the negative; unless actuarial calculations clearly show an impact upon the retirement fund, where transfer is made to division "B" of the retirement system and retirement is made after 30 years of actual service regardless of age, in excess of retirement after 30 years regardless of age under Chs. 121 and 134, F. S., as preserved under §122.01(3), F. S.

057-260—August 28, 1957

**OFFICES, OFFICERS AND PUBLIC RECORDS
POWERS AND DUTIES OF OFFICERS—CONSTRUCTION OF
§116.10, F. S., NEPOTISM PROHIBITED.**

To: State Auditing Department, Tallahassee

QUESTION:

1. Is the relationship, mentioned in §116.10, F. S., determined by the common or canon law or by the civil law?

2. Does §116.10, F. S., prohibit the employment of a person within the prohibited degree for short periods of time under circumstances where the failure to employ such person would impair the operation of the office?

Section 116.10, F. S., prohibits the employment by public officers of persons related to them "within the fourth degree, either by consanguinity or by affinity." Such employment is declared by the statute to constitute misfeasance and malfeasance in office and the officer subject to suspension and removal from office. The statute being penal in nature must be strictly construed (*State v. Keefe*, 111 Fla. 701, 149 So. 638).

There are two methods used in computing degrees of kinship by consanguinity or affinity; one by the common or canon law and the other by the civil law. This office in opinions of June 20, 1933 (1933-4 B. R. 574), June 22, 1933 (1933-4 B. R. 574) and July 5, 1933 (1933-4 B. R. 577) held that the civil law rule of computing kinship should be used in construing said §116.10. However, this office in its opinion of Aug. 31, 1946 (1945-6 B. R. 230), without making any reference to the said 1933 opinions, held that the canon or common law rule should be used in construing said §116.10.

Authorities from other states hold that the civil, and not the canon or common law, applies in computing the degrees of kindred when construing nepotism statutes (*Graham County v. Buhl*, 76 Ariz. 275, 263 P. 2d 537; *Bailey v. Turner*, 108 Kan. 856, 197 P. 2d 537; *Smallman v. Powell*, 18 Or. 367, 23 P. 249; *Clayton v. Drake*, 17 Ohio St. 367; *Barton v. Alexander*, 27 Idaho 286, 148 P. 471, Ann. Cas. 1917 D. 729; 67 C. J. S. 133, §22). The above cited cases also show that the canon or common law rule of determining kinship was limited, even in England, to the descent and distribution of property and not to other matters. The civil law rule was used, even in England for determining who should administer the personal estate of a descendant.

We have examined the cases of *Walsingham v. State*, 61 Fla. 67, 56 So. 195 and *Kuehmsted v. Turnwall*, 103 Fla. 1180, 138 So. 775, referred to in the opinion of Aug. 31, 1946, and doubt that the court held or intended to hold that the canon or common law rule was to be applied in this state as the sole and only rule for determining degrees of kinship. We, therefore, think that the said opinion of Aug. 31, 1946 should be disapproved and that we should return to the rule announced in the opinions of June 20 and 22 and July 5, 1933.

As to the 2nd question, we feel that §116.10, F. S., establishes a rule for state, county and municipal employment, and that both permanent and temporary employment are governed by the same rule. Emergency help, such as assistance made necessary

by reason of illness, injuries, vacations and the like are within the rule, and §116.10 must be complied with in such employment.

We, therefore, hold that the rule of the civil law should be used in determining kinship under §116.10, F. S., and that the said section applies to both permanent and temporary or emergency help.

057-261—August 29, 1957

SURVEYS

ESTABLISHMENT OF MARKERS WHERE NONE PREVIOUSLY EXISTED OR RIGHT TO REPLACE LOST MARKERS—

§§143.01, 177.05 AND 177.07, F. S.; §7, ART. VIII,
STATE CONST.

To: *Trustees of the Internal Improvement Fund, Tallahassee*
QUESTIONS:

1. Is the county surveyor, county engineer, or parties under direction of such officer, authorized to establish new section or $\frac{1}{4}$ section corners, if any part of the county was not sectionalized by the original government survey?

2. If obliterated or lost section or $\frac{1}{4}$ section corners are to be re-established, has the county surveyor or county engineer priority over private surveyors, and which is of the most value?

3. Is there any prohibition against restoring or setting in concrete lost or obliterated section corners by private surveyors, or is this right reserved to the county engineer or county surveyor?

County surveyors are duly elected county officers as provided by §7, Art. VIII, State Const. The duties of the county surveyor are set out in §143.01, F. S. There is no provision contained therein pertaining to establishing new corner markers or re-establishing lost or obliterated markers.

AS TO QUESTION 1:

Section 177.05, F. S., pertaining to maps and plats, in part provides:

... If the premises are in a Spanish grant or are not included in the subdivision of the government surveys, then the boundaries are to be defined by metes and bounds and courses. The initial point in the description shall be tied to the nearest government corner, forty-acre corner, or other recorded and well established corner ...

It is my opinion, in light of the above, that a county surveyor or county engineer is precluded from establishing a section or $\frac{1}{4}$ section marker where one did not previously exist. Question 1 is, therefore, answered in the negative.

AS TO QUESTION 2:

There is no provision in the Florida Statutes for re-establishing a lost or obliterated marker. Therefore, by statute, there is no priority between a county surveyor and a private surveyor. If the corner is re-established by either the county surveyor or a private surveyor, it should be fixed as originally located by the official government survey. A change in the location of the original corner as established by an official federal government

survey, either by state, county or other surveyor, will not change the original federal government survey (43 U.S.C.A., §752, *Vaught v. McClymond* [1945], 155 P. 2d 612, 116 Mont. 542). The value of each would seem the same, but both are subordinated to the original government survey.

AS TO QUESTION 3:

There is no provision in the Florida Statutes authorizing the restoring or setting of markers by either county or private surveyors. Section 143.01, F. S., does not designate this as one of the duties of the county surveyor. Section 177.07, F. S., requires permanent reference monuments, but is not authority for setting markers where no government survey markers are located.

While cases were found from other states where county surveyors had set markers, since they are not controlling over the original survey, it would seem that in the absence of specific authority such markers should not be set by either county or private surveyors.

057-262—August 29, 1957

CIVIL PRACTICE AND PROCEDURE

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT LAW —MAINTENANCE OF ACTION IN FLORIDA FOR SUPPORT OF NEEDY PARENTS—CH. 88, §88.081, F. S.

To: *Quentin V. Long, Assistant State Attorney, Fort Lauderdale*
QUESTION:

The initiating state recognizes that children are liable for the support of their needy parent or parents. Under the Florida act such liability is not recognized. Is Florida bound by the law of the initiating state in giving jurisdiction over a situation where a needy parent seeks support from a child on the strength of the initiating state recognizing such a situation even though Florida does not recognize same?

Section 88.081, F. S., prescribing what duties of support are applicable under the said Ch. 88, reads as follows:

88.081 Choice of law.—Duties of support applicable under this chapter are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

New Jersey's reciprocal support law contains the same provision as our §88.081 and, in construing said provision, the supreme court of New Jersey said in *Daly v. Daly* (N.J.), 123 A 2d 3, that:

The provision is very clear that the duties of support under the act are those imposed or imposable under the laws of the state where the obligor was present during the period for which support is sought, and the presumption places on him the burden of going forward with proof that he was not present in the responding state during such period. . . .

And, as is said in a note found on p. 102 of the 1956 cumulative pocket part to Vol. 9-A of *Uniform Laws Annotated*, with respect to support duties under reciprocal support laws:

... Since most actions are for a prospective and continuing support order, the obligor will thus be subject to the support duties set forth by the law of the state where he is found—namely the responding state. ...

When §88.081 is considered in the light of the above quoted statements, I think that when a support action is maintained under our uniform reciprocal enforcement of support law against an obligor residing in Florida for the purpose of procuring prospective and continuing support for the future, the laws of Florida govern the question of whether the obligor is legally liable for such support. I find no provision in the laws of Florida making a child responsible for the support of his needy parent, and therefore it is my opinion that a support action cannot be maintained against a Florida resident for prospective and continuing support for his needy parent for the future.

I think that an action may be maintained against a Florida resident for the support of his needy parent only when the action is brought to enforce a duty to support such parent which was imposed upon such Florida resident by the laws of another state where the obligor was present during the period of time for which such support is sought. For example, if a man was in another state throughout the year 1956, and if the laws of that state imposed upon him the duty of supporting his needy parent, and if he moved to Florida on Jan. 1, 1957, without fulfilling said duty of support, then I think that §88.081 authorizes an action to be brought under Ch. 88 to recover the support money which it was his duty to pay during the year 1956 under the laws of such other state.

057-263—August 29, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
FRONTONS, RACING ETC.—CHARGING OF ADMISSION FOR
PRACTICE GAMES OR SCHOOLING RACES—CH. 551,
§§205.61, 550.03, F. S.**

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Would the action of the racing commission of the state allowing the Munro Operating Co. of Dania, a licensed jai alai fronton under the provisions of Ch. 551, to operate eight nights of exhibition jai alai prior to the opening of the regular session and permitting and allowing an organization to charge admissions for the benefit of the Babe Zaharias cancer fund be considered a charity night under the provisions of §550.03, F. S.?

2. If this was a charity night, should not at least one-fourth of the proceeds have been paid to the university of Miami as provided in §550.03, F. S.?

In order to understand the action of the racing commission in this particular case, this is to advise that the Munro Operating Co. had secured an occupational license from the county judge of Broward county under the provisions of §205.61, F. S., which relates to theatrical shows, travelling players and minstrels, etc., and to license taxes paid by such shows and minstrels in the state, the operating company being of the view that prior to the

opening of the regular jai alai season that they could put on an exhibition of jai alai under the provision of §205.61 and pay the tax accordingly. Therefore, prior to Nov. 10, 1956, and prior to the meeting of the racing commission wherein the eight nights of exhibition were allowed jai alai operators as a training period for players, the Babe Zaharias cancer fund and those interested in such fund had secured permission from Munro Operating Co. to sell tickets to a jai alai exhibition and to allow the general public to attend said exhibition, all of the benefits to go to the Babe Zaharias fund.

When this matter was brought to the attention of the racing commission, the commission took the position that it and it alone has jurisdiction over jai alai fronton exhibitions, regardless of when they may be performed, and in order to allow the jai alai players to get in physical condition the commission adopted a rule for training or schooling which included a former rule for schooling races for dogs and took into account the jai alai situation. The rule adopted is as follows:

No person, firm, corporation or association licensed by the Florida State Racing Commission to conduct dog racing, jai alai or pelota games, shall conduct any dog races or jai alai games directly or indirectly other than on the dates annually fixed and set by this Commission in the license annually issued to such person, firm, corporation or association pursuant to law; provided, however, that the Florida State Racing Commission may grant any such person, firm, corporation or association, not to exceed 8 days, Sundays excluded, for schooling races for dogs or practice games for jai alai, prior to the opening date fixed and set in the current license issued to such licensees, provided, further, that such approval for schooling or training periods shall not permit the licensee to charge admission, or allow the admission of minors.

After this rule had been adopted and due to the fact that certain advertisement had already taken place, in order to do equity in the case under the circumstances, a motion was made by Mr. Johnson of the racing commission and adopted to the effect that Dania Jai Alai Ass'n would be permitted to open on Nov. 10, 1956, and charge admission for the benefit of the Babe Zaharias cancer fund and that that particular night could be counted as one of their eight nights of exhibitions or practice games *provided that no pari-mutuel wagering would be conducted and no children would be allowed to attend.* This was in conflict with the advertisement insofar as prohibiting the children to attend was concerned, however, it was accepted by the Dania Jai Alai Ass'n, and since there was no pari-mutuel wagering involved, it could not be considered as a charity night under the provisions of §550.03, F. S., because that statute anticipates pari-mutuel wagering and that the money which would otherwise be paid to the state as taxes, but for the charity, would go into the charity fund.

I am certain that under the rule adopted by the racing commission heretofore cited, neither the Munro Operating Co. nor other fronton operating company nor any dog track would in the future be allowed to charge admissions to a practice game or schooling race.

Having answered your 1st question in the negative, it is unnecessary to answer the 2nd question.

057-264—August 29, 1957

OFFICES, OFFICERS AND PUBLIC RECORDS**PUBLIC RECORDS IN OFFICE OF TAX ASSESSOR—§§28.24, 119.01, 119.03, 193.17 AND 193.20, F. S.***To: Mellor and Watson, Fort Myers***QUESTION:**

Are land study maps, also known as assessors' maps or section maps, property record cards, correspondence files, and other papers and documents in the office of county tax assessors of this state public records within the purview of §119.01, F. S.?

Section 119.01, F. S., provides that "all state, county and municipal records shall at all times be open for a personal inspection by any citizen of Florida . . ." This section, as §424, R. G. S., 1920, was held mandatory in *State v. Couch*, 115 Fla. 115, 155 So. 153, text 154. However, this "right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection . . ." (*Lee v. Beach Pub. Co.*, 127 Fla. 600, 173 So. 441, text 442). That seems to bring us to the question of what are "state, county and municipal records," within the purview of said §119.01, F. S.

The court, in *Amos v. Gunn*, 84 Fla. 285, 94 So. 615, text 634, in considering what was a public record, stated that "what is a public record is a question of law. A public record is a written memorial, made by a public officer and that officer must be authorized by law to make it . . . A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done . . ." The court, in *Bell v. Kendrick*, 25 Fla. 778, 6 So. 868, text 869, after referring to *Coleman's Case*, 25 Grat. (Va.) 865, said that a "public record must be a written memorial, intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it; and the authority for it need not be derived from express statutory enactment, but, wherever a written record of the transactions of a public officer is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that written memorial, whether expressly required so to do or not, and, when kept, it becomes a public document—a public record—belonging to the office and not to the officer." On account of the inconvenience of removing such documents, certified copies of them are admissible as evidence (*Bell v. Kendrick*, supra; *Simmons v. Spratt*, 20 Fla. 495).

The supreme court of Oregon, in *State v. Brantley*, 201 Or. 637, 271 P. 2d 668, text 672, stated that "a public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." In this connection see also 76 C. J. S. 112-3, §1; *Black's Law Dictionary*, 4th Ed. 1438; 45 Am. Jur. 420, §2). "Every memorandum made by a public officer is not a public record; papers or memoranda in the possession of public officers which are not required by law to be kept by them as official records, are

not public records (76 C. J. S. 113, §1, notes 14 and 15). "Correspondence of officials relating to private affairs, although in connection with public business, and memoranda of public officers made for their own convenience, even if made at public expense, are not public records unless made so by statute" (76 C. J. S. 113, §1, notes 17, 18, 19 and 20).

Work sheets of technician in coroner's office (*State v. Shepard*, Ohio, 128 N. E. 2d 471, text 499), highway department's "fatality sheet," (*Welch v. Medlock*, 79 Ariz. 247, 286 P. 2d 756, text 759), appraisal cards, prepared by appraisal company under contract with a township in connection with a resurvey of all property in the township (*Tagliabue v. North Bergan Twp.*, 9 N. J. 32, 86 A. 2d 773, text 775), letters written by a state insurance commissioner to an insured (*Kansas City Life Ins. Co. v. Meador*, 186 Okla. 397, 98 P. 2d 20, text 22), letters written by a fire marshal (*Douras v. Newcomb*, Okla., 267 P. 2d 600, 604) have been held not to be public records.

County tax assessors are required to assess lands other than subdivision lands and lands in city limits by townships, and to assess subdivision lands and lands within city limits in regular order or by lots and blocks (see §§193.17 and 193.20, F. S.). In this connection the county commissioners were, as early as 1895 (see §21, Ch. 4322, 1895), required to purchase and furnish township maps of the government survey of lands in Florida to the offices of the tax assessor and the clerk of the circuit court (§193.17, F. S.). Doubtless the intention of the legislature in furnishing such plats to the tax assessor was to assist in making the assessments in the manner required by §193.20, F. S. Said §193.17, F. S., also recognizes the right of the office of county tax assessor to procure and use subdivision plats and other information needed or convenient in making tax assessments, when it provides that "all these maps and information which may come into the hands of the several county assessors of taxes which may be used in preparing the assessment roll shall remain in the county assessor of taxes' office in their several counties."

In the light of the above and foregoing we hold that the township maps and other maps and plats of subdivisions and other land areas, used by the county tax assessor in assessing taxes in his county are public records subject to inspection by the public, so long as such inspection does not hinder the tax assessor in the preparation of his tax roll and extending the taxes. We doubt that the average correspondence file in the office of the county tax assessor is a public record; however, the question is one to be determined from the nature and purpose of each particular item of correspondence. Although we are not fully advised of the nature of the "property record cards," mentioned in the request for opinion, and their purpose, if they form a permanent record for the use of the office, although changes and corrections are made when necessary, they would seem to constitute a public record. Other papers and documents are not here considered and passed on, however, whether or not they are public records should be determined by applying the rules above considered and referred to.

Although the above paragraph seems to answer the above stated question generally upon the facts before us, there seems to be present the question of the right of the tax assessor to

furnish copies and certified copies of records and documents of record or on file in both the office of the clerk of the circuit court and the office of the county tax assessor. Provision is made by §28.24, F. S., for the furnishing of copies and certified copies of records and documents in the office of the clerk of the circuit court, which records and documents would seem to include at least some of the plats, maps and records of the tax assessor's office. Although §119.03, F. S., makes provision for the making of copies of public records by members of the public, we do not think that it should be extended so as to permit the furnishing of copies and certified copies of any records or documents on file or of record in the office of the clerk of the circuit court. Section 119.03, F. S., provides for the furnishing of assistance to the public by the officer having custody of public records and documents, however, we do not think that this provision may be construed as authorizing the furnishing of copies and certified copies by the officer. As to any records and documents not also of record in the office of the clerk of the circuit court it would seem that the tax assessor might furnish copies and certified copies at and for the same compensation as is applicable to the clerk of the circuit court for similar services.

This opinion does not consider or discuss the right of the tax assessor or the clerk to furnish, under section 119.03, F. S., negatives of public records from which copies may be made.

057-265—September 5, 1957

COURTS

SUBSTITUTION OF JUDGES, §2, ART. V, STATE CONST..

§§26.43, 32.06, 33.07, 36.16(1), (2), 37.22, 38.09, 38.11, 39.11, 39.15 AND 42.09, F. S.

To: *State and County Judicial Officers*

QUESTION:

What procedure should be followed when a judge of any court other than a municipal court is disqualified, absent or otherwise unable to act?

Please be advised that requests for substitute judges should be directed to the chief justice of the supreme court of the state under the provisions of §2, Art. V State Const., which states as follows:

The chief justice of the supreme court is vested with, and shall exercise in accordance with the rules of that court (Florida Rules of Appellate Procedure, Rule 2.1(a) (4)) authority temporarily to assign . . . judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction.

As a practical matter, the end result in some instances may remain unchanged but the procedures in the following sections of the Florida Statutes and any other sections of the general or special law pertaining to the substitution of judges are modified or superseded by the recently revised §2, Art. V, State Const. Some of the modified sections of the Florida Statutes are: 26.43, circuit courts; 32.06, criminal courts of record; 33.07, civil courts of record; 36.16 (1), (2), county judges court; 37.22, justice of the peace courts; 38.09, 39.11, judges (the Florida supreme court held

in Re Advisory Opinion to the Governor, 58 So. 2d 319, that §38.11, F. S., was superseded and repealed by implication insofar as it applies to disqualification of judges when §38.09, Florida Statutes, was enacted); 39.15(6), juvenile courts and 42.09, small claims courts.

Furthermore, this revised section of the Florida constitution has the effect of modifying and superseding certain cases and advisory opinions to the governor rendered by the Florida supreme court. Where there is conflict, the recent constitutional amendment is controlling. Some of the recent opinions to the governor so modified or superseded will be found at 86 So. 2d 158, 63 So. 2d 274 and 58 So. 2d 319.

All former opinions of this office pertaining to this subject are superseded or modified to come into conformity with the above mentioned constitutional article and this opinion. Some of these opinions are: 043-172, 1943-1944 B. R., P. 122; 045-103, 1945-1946 B. R., P. 786; 053-298, 1953-1954 B. R., P. 46 and 057-251.

As a practical matter it is suggested that all judges notify the chief justice of the supreme court as far in advance as possible when it is known that a substitute judge will be needed. It is further suggested that the name of any judge, qualified under Rule 2.1(a)(4) (supra), who has indicated his willingness to substitute, be submitted with this notice.

057-266—September 5, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
PERSONAL ATTENTION TO DUTIES OF OFFICE—PARTIC-
IPATION IN PRIVATE BUSINESS—§15, ART. IV AND
§17, ART. XVI, STATE CONST.**

To: LeRoy Collins, Governor of Florida, Tallahassee

QUESTION:

May county officers, openly and under their own names, engage in private business for profit?

One of the grounds for suspension from office, under §15, Art. IV, State Const., is "*neglect of duty in office.*" Under §17, Art. XVI, State Const., "no person shall hold any office of trust or profit under the laws of this state without *devoting his personal attention* to the duties of the same." Section 18, Art. XVI, state constitution, requires the legislature to provide "for deductions from salaries of public officers *who neglect the performance of any duty* assigned them by law." (Emphasis supplied.) Mere absence from office does not of itself seem to constitute "neglect of duty in office," or failure to devote "personal attention to the duties of" an office (Advisory Opinion 151 Fla. 44, 9 So. 2d 172, text 175; Advisory Opinion, 67 Fla. 423, 65 So. 4). There must be a neglect of the duties of the office or a failure to devote the officer's personal attention to the duties of the office.

"Neglect of duty has reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law. It is not material whether the neglect be willful, through malice, ignorance or oversight. When such neglect is grave and frequent or is such as to endanger or threaten the public

welfare it is gross" (State v. Coleman, 115 Fla. 110, 155 So. 129, text 132; 92 A. L. R. 988). It has been held that under a statute permitting removal for inefficiency, neglect of duty, or nonfeasance in office, it was not a ground for removal that the officer engaged in an occupation or business unless the officer so occupied himself with other than his official duties that he neglected such duties, in which case he may be removed for nonfeasance in office or neglect of duties (Holmes v. Osborn, 57 Ariz. 522, 115 P. 2d 775).

Under the state constitution public officers are required to devote their personal attention to the duties of their offices (§17, Art. XVI, State Const.) and where there is a failure by an officer to devote his personal attention to the duties of his office there is a neglect of the performance of the duties of that office (§15, Art. IV, and §18, Art. XVI, State Const.). It, therefore, appears that county officers may, openly and under their own names, engage in private business only when they are able, notwithstanding such business operation, to devote their personal attention to the duties of their office. Where, by reason of the operation of such a business, a public officer cannot or does not devote his personal attention to the duties of his office there will be a neglect to perform the duties of that office within the purview of §15, Art. IV, State Const.

These observations seem to answer the above stated question.

057-267—September 5, 1957

COUNTY ORGANIZATION AND OFFICERS

CONSTABLES—EMPLOYMENT OF UNAUTHORIZED DEPUTY CONSTABLES

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. May a constable who is not authorized by statute to employ a deputy, but who does employ a person who performs some of the duties of the constable, charge and collect the fees provided by law for constables in criminal cases, when the services for which the said fees are provided were performed by the employee and not by the constable?
2. May the salary and expenses paid to such an employee be properly charged to the expenses of the office, thereby reducing the net income, and the excess income payable to the county?
3. Do the answers to the above questions also apply to the services of deputy constables employed in excess of the number authorized by statute, in cases where a statute authorizes a constable to appoint one deputy or a certain number of deputies?

AS TO QUESTION 1:

There is no statute authorizing the constable's action in employing such person as deputy constable. Therefore, neither the constable nor his unauthorized deputy would be entitled to collect any fee from the county since there is no authority for making such a payment. To hold otherwise would serve as a precedent inferring to constables and other law enforcement officers that

they might hire additional deputies where none are authorized by law.

There is also the possibility that the use of unauthorized persons to perform law enforcement duties might result in liabilities to the constable from false or illegal arrest, impersonation of an officer or because of other improper acts of such unauthorized persons.

The answer to question 1 is in the negative.

AS TO QUESTION 2:

For the reasons set out above, it is my opinion that the salary paid to, and expenses incurred by, an unauthorized deputy constable should not be considered as an obligation of the county. Perhaps the deputy is entitled to some remuneration for his time and services but his action, if any, would apparently lie against the constable who hired him rather than the county wherein he was employed.

Question 2 is therefore answered in the negative.

AS TO QUESTION 3:

The answers to questions 1 and 2 apply to question 3.

057-268—September 6, 1958

PUBLIC LANDS AND PROPERTY

USE OF STATE OWNED LANDS BY LOCAL WATER CONTROL AUTHORITIES CREATED BY SPECIAL ACTS

To: *W. Turner Wallis, Internal Improvement Fund, Tallahassee*

QUESTIONS:

When, by special act of the legislature, a local water conservation and control authority is created and the authority is granted certain rights in state owned lands,

1. Who makes the final determination as to what uses state lands may be put for carrying out the purposes of the authority?

2. What criteria are to be used to determine the "state purposes" which preclude the use of land by the water control authority?

3. What procedure is to be followed by the authority and the trustees in processing applications for use of state lands?

4. When the rights of riparian owners are involved and appropriated by the authority, must compensation be paid therefor?

5. What is required of the trustees to grant an interest in state lands within the contemplation of the act?

6. Does the removal of material from state lands require a permit from the trustees?

7. Where the trustees execute an instrument in favor of the authority are they relieved of their trust to protect the public interest where the trustees' interpretation of public interest conflicts with the objectives of the authority?

8. What criteria are to be used to determine state lands which should not be granted to the authority?

It is the established practice of this office not to pass upon the constitutionality of any statutes or legislative acts since I feel

that such questions can be settled with finality only in an appropriate proceeding by a court of competent jurisdiction. Therefore, for the purpose of this discussion, we assume the constitutionality of all acts to which reference is made.

You are concerned with the following acts pertaining to water control, viz: (a) Oklawaha basin recreation and water conservation and control authority (Ch. 29222, special acts, 1953); (b) Tsala Apopka basin water conservation and control authority (Ch. 30653, special acts, 1955); (c) Suwannee river water conservation and control authority (Ch. 57-700, special acts, 1957); (d) Southwest Florida water conservation and control authority (Ch. 57-925, special acts, 1957); (e) Alachua county recreation and water conservation and control authority (Ch. 57-1119, special acts, 1957) and (f) Sumter county water conservation and control authority (Ch. 57-1877, special acts, 1957).

Particular reference is made to a section appearing in each of these acts identical in language, reading as follows:

That the Authority shall have the right to take, exclusively occupy, use and possess, insofar as may be necessary for carrying out the provisions of this Act, any areas of land owned by the State of Florida, and within the territorial extent of the Authority, not in use for State purposes, including, without limiting the foregoing general terms, swamps and overflowed lands, bottoms of streams, lakes and rivers, and the riparian rights thereto pertaining, and, when so taken and occupied, due notice of such taking and occupancy having been filed with the Trustees of the Internal Improvement Fund of the State of Florida by the Authority, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this Section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any Court of competent jurisdiction that there are any lands owned by the State of Florida which may not be so granted, then the provisions of this Section shall continue in full force and effect as to all other lands owned by the State of Florida and granted to the Authority hereunder. The provisions of this Section are subject to all laws and regulations of the United States of America with respect to navigable waters.

Your questions will be answered in the order in which they appear above.

1. Where the lands owned by the state are not in use for state purposes, the authority, in its sound discretion, would determine whether the lands are needed to carry out the purposes of the authority. This discretion would be subject to review by the court.

2. This section does not specify when land is in use for a state purpose. However, it seems that this decision is left with the trustees of the internal improvement fund. The trustees' decision here would also be subject to review by the court. If this "state purpose" were not intended for the decision of the trustees of the internal improvement fund, the due notice provision of the section would be meaningless. Even if there is no conflict and the land is being used for a state purpose, I do not believe the section

would apply since it says, "... not in use for state purposes, ..."

3. The notice of filing required under the act should adequately describe the land and give the trustees opportunity to determine if it is being used for a state purpose. Under my interpretation of this section the land cannot be taken and used legally by the authority until due notice is given and approval thereof is given by the trustees of the internal improvement fund. It seems that an acknowledgment is necessary from the trustees of the internal improvement fund in order that the authority might know that the land is not being used for a state purpose.

4. The authority is permitted under the various acts to acquire riparian rights by purchase, gift, lease, condemnation or eminent domain or any other manner. Condemnation or eminent domain proceedings shall be maintained by and in the name of the authority and the proceeding shall be, except insofar as is altered in the particular act, that prescribed for use by counties in Florida. Chapter 127, F. S., provides for the taking of property by a county by eminent domain proceedings and Ch. 73, F. S. is the general eminent domain statute. Both the Florida and federal constitutions provide that no person shall be deprived of property without due process of law. They also provide that no private property shall be taken without just compensation. These provisions are thus limitations on the power of the legislature and except as limited or prohibited by the constitution proceedings for the acquisition of property by eminent domain are as prescribed by the legislature. *DeSoto County v. Highsmith* (1952, Fla.) 60 So. 2d 915. Private property may be taken only for a public use and the determination of this public use is ultimately a judicial question. *Wilton v. St. Johns County* (1929) 98 Fla. 26, 123 So. 527, 65 A.L.R. 488. The owner of the property has a right to be heard as to the compensation to be paid and the amount of compensation is determined by jury prior to taking of the property. *Spafford v. Broward County* (1926) 92 Fla. 617, 110 So. 451. Riparian owners are entitled to just compensation for the taking of their special property rights in use of water. *Broward v. Mabry* (1909) 58 Fla. 398, 50 So. 826. Thus, the riparian owner has a right to compensation for property taken under one of these acts and he also has a right to be heard in the determination of the use for which the property is taken and the compensation to be paid.

5. The use of state lands is given to the authority "... insofar as may be necessary for carrying out the provisions ..." of the act. Consequently, the trustees, in their discretion, may grant the estate it finds necessary to effect the purposes of the authority, whether such be by way of lease, license, easement or otherwise. I do not consider that the act automatically transfers an interest in state lands to the authority. In other words, its use of state lands is limited to that granted by the trustees upon a proper showing in a given situation.

6. Where materials are necessary for the purposes of the act, the authority must procure a permit from the trustees.

7. Where the land in question, in the sound discretion of the trustees, is being used for a state purpose, the trustees should not release it in the absence of a court order. Until such time as "use" is defined by the courts, the trustees should interpret this to mean any land which is now being used or which the trustees contemplate may be used for a state purpose. If the trustees

determine that the land is not being used for a state purpose within the contemplation of the act and the authority determines the land is necessary to carry out its functions, then the trustees are absolved from their trust to protect the public interest to the extent of the grant made to the authority.

8. The criterion to be used in determining state lands which cannot be granted to a water control authority is a question for judicial determination and not one which can be answered by this office.

To clarify the position of the authority, it is my opinion that there is no automatic vesting of an interest or right in the authority to state lands. Whatever right or interest the authority has in state lands is obtained by instrument executed by the trustees after the approval of an appropriate application.

057-269—September 10, 1957

PUBLIC LANDS AND PROPERTY

ESTABLISHMENT OF BULKHEAD LINES—CH. 57-362 (§253.122, F. S.)

To: *J. E. Satterfield, City Attorney, Dunedin*

QUESTIONS:

1. Since subsection (1) of §2, Ch. 57-362, 1957, empowers the board of county commissioners or governing body of a municipality "... after public hearing of which 30 days prior notice has been given by publication of such hearing for three consecutive weeks ... on their own initiative to locate and fix ..." bulkhead lines, is notice and public hearing required where application is made by a riparian owner to fix a bulkhead as provided by subsection (2)?

2. Where the bulkhead line is fixed by the trustees of the internal improvement fund under subsection (3), is the notice and hearing provided in subsection (1) a prerequisite to such action?

Subsection (1) of §2, Ch. 57-362, 1957, insofar as here material, provides:

(1) Subject to the formal approval of the trustees of the internal improvement fund, the board of county commissioners of each county or governing body of any municipality, after public hearing of which at least 30 days prior notice has been given by publication of such hearing for three consecutive weeks in a newspaper having general circulation in the county, are hereby authorized on their own initiative to locate and fix a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable waters of the county, as defined in §253.12 herein, ...

Subsection (2) of said Ch. 57-362 reads:

(2) Upon the written application of any riparian owner addressed either to the board of county commissioners or the governing body of any municipality wherein the land lies, the board or governing body is directed to locate and fix a bulkhead line or lines within the area and vicinity of the land owned by such applicant in the

event a bulkhead line or lines has not been established by the board pursuant to subsection (1) above.

Subsection (3) simply substitutes the trustees of the internal improvement fund in place of the local authority where the upland owner files written application which is not acted upon within 60 days from filing. In such event, upon proper application, the trustees fix and locate the bulkhead line.

It is to be noted that the language in subsections (2) and (3) does not include specific requirements for published notice and a public hearing as does subsection (1).

It should also be observed that there are two methods of initiating the location of a bulkhead line; one, by the local authority in its own right (subsection (1)) and the other by written application of an upland owner (subsection (2)).

The fundamental rule for construction of a statute is to ascertain and give effect to the intention of the legislature as expressed therein (*City of St. Petersburg v. Siebold*, 48 So. 2d 291). Also, the legislative intent is to be determined from the language of the statute, the subject regulated, the purpose to be accomplished and the means applied for accomplishing the purpose (*Lee v. Jacksonville Gas Co.*, 138 Fla. 890, 190 So. 800). Still another rule of statutory construction is that the statute must be construed as a whole and effect given to all parts thereof (*Snivley Groves v. Mayo*, 135 Fla. 300, 184 So. 839). It is stated in *Chiapetta v. Jordan*, 153 Fla. 788, 16 So. 2d 641 that all parts of a statute must be considered and harmonized so that the whole scheme may be made effectual.

Applying these rules to the question under consideration, we must read §2 as a whole and not interpret each subsection separately. By so doing, it must have been the intention of the legislature that no bulkhead lines should be determined or fixed without notice and without a public hearing pursuant to said notice despite the fact that the language so requiring is not repeated in subsections (2) and (3) of said §2. One upland owner may set the wheels in motion to establish bulkhead lines, whereas others may be affected thereby. These would be deprived of notice and an opportunity to be heard. Once established, a bulkhead line may be changed only after published notice of hearing. It would thwart legislative intent to say that only when once fixed must public notice be given of a proposed change. That notice and public hearing is contemplated is borne out by the provisions of subsection (5) giving an aggrieved party the right of appeal of a decision of the local authority or the trustees of the internal improvement fund, which requires the authority establishing the bulkhead line to prepare and certify "... a transcript of all proceedings including the evidence introduced at such public hearing ..."

It, therefore, follows that question 1 is answered in the affirmative.

Since, under subsection (3) of the act the trustees are substituted in place of the local authority where that authority fails to fix or determine the bulkhead line, there is all the more reason for publication of notice and a public hearing, as the action taken is removed from the local scene. The 2nd question is answered in the affirmative.

057-270—September 10, 1957

PUBLIC BUSINESS

CONSTRUCTION OF CH. 57-808 (§282.03(4), F. S.)—APPROPRIATION FOR AGRICULTURAL AND LIVESTOCK BUILDINGS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. What is the maximum amount an applicant may receive, under Ch. 57-808 from July 1, 1957 to June 30, 1958, who did not participate in the program under Ch. 29832, 1955, during the July 1, 1955 to June 30, 1957, biennium?

2. What is the maximum amount an applicant may receive under said Ch. 57-808, from July 1, 1957 to June 30, 1958, who participated in the program under said Ch. 29832, during the July 1, 1955 to June 30, 1957, biennium?

3. Under what conditions may any of the above receive moneys during the period from July 1, 1958 to June 30, 1959?

The 1955 enactment contained the limitation that "in no event shall an amount greater than twenty thousand dollars be expended from said appropriation (that is, the three hundred thousand dollar appropriation in the said 1955 enactment) for the construction of a building for any county, city or fair association." The limitation in the 1957 enactment was that "in no event shall an amount greater than twenty-five thousand dollars be expended from said appropriation for the construction of buildings for any county, city or fair association, *from funds heretofore or hereby appropriated for such purpose. Provided, however, that after July 1, 1958, any amount not greater than twenty-five thousand dollars may be expended from the appropriation for the construction of buildings for any one county, city or fair association from the unexpended balance of this appropriation regardless of the amount previously expended under any other act for that one county, city or fair association.*" (Emphasis supplied.)

We note that where the 1955 enactment fixed a limit of \$20,000, for the construction in any one county, city or fair association, *from the funds appropriated by the 1955 act*; while the 1957 enactment fixed a limit of \$25,000 for the same purpose from appropriations made by the 1955 and the 1957 enactments. For example, where \$15,000 had been expended from the 1955 enactment for a particular building an additional \$10,000 could be expended from the 1957 enactment. This leads to the conclusion that the maximum amount of an applicant, who did not participate under the 1955 enactment, would be \$25,000 under the 1957 act; and that where an applicant participated under the 1955 enactment his participation under the 1957 act would be the difference between his participation under the 1955 enactment and \$25,000, each case being subject to funds being available under the 1957 appropriation. These observations answer the 1st and 2nd questions.

The 3rd question is answered by a construction of the proviso above quoted making the application of the enactment after July 1, 1958. This proviso in effect provides that an amount not greater

than \$25,000 may be expended from any unexpended balance of the 1957 appropriation remaining on July 1, 1958, "regardless of the amount previously expended under any other act" for any one county, city or fair association. This seems to authorize an expenditure not to exceed \$25,000, without regard to expenditures made under the 1955 enactment, from any funds remaining in the 1957 appropriation after July 1, 1958. These observations seem to answer the 3rd above question.

Some mention of rules and regulations under the 1955 enactment appears in the file; a reading of the 1955 and 1957 enactments reveals that the same rule in this connection is applicable to both of said enactments.

057-271—September 10, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
EXPENDITURE OF COUNTY FUNDS FOR CIVIL DEFENSE
OBSERVATION TOWER—CH. 252; §252.09, F. S.**

To: Paul E. Sawyer, Legal Advisor, County Commissioners, Key West

QUESTION:

Can the board of county commissioners of Monroe county expend county funds for materials and labor to be used in the erection of an observation tower for use by volunteers of Monroe county civil defense program?

The 1951 legislature, recognizing the importance of civil defense programs, both nation-wide and within the state, enacted Ch. 26875, 1951. This act, named Florida civil defense act, now appears as Ch. 252, F. S. Section 252.09, F. S., 1955, provides in part:

(2) Each political subdivision shall have the power and authority:

(a) To appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any disaster resulting from enemy attack; and to direct and coordinate the development of civil defense plans and programs in accordance with the policies and plans set by the federal and state civil defense agencies.

The language of the statute quoted above authorizes a board of county commissioners to appropriate and expend funds etc., for civil defense purposes and also empowers and authorizes the county commissioners to develop civil defense plans and programs in accordance with policies and plans set up by the federal and state civil defense agencies.

It is clear that the Florida civil defense act contemplates the development of a state-wide as well as nation-wide civil defense program. This seems to place a limitation on the appropriation and expenditure of funds for a county civil defense organization, such limitation being that expenditures made by a local civil defense organization shall be made in the furtherance of a broad state-wide and/or nation-wide civil defense program.

I am of the opinion that the erection of an observation tower,

to be used by civil defense volunteers, is an expenditure permitted by the aforementioned limitations and that the board of county commissioners of Monroe county, under authority given them by §252.09(2)(a), F. S., may properly expend county funds for materials and labor in the erection of such observation tower.

The question presented is answered affirmatively.

057-272—September 11, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

SALE OF LIQUID FUELS—STATE FIRE MARSHAL— CONSTRUCTION OF §§526.12-526.22, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTIONS:

1. Subsections (1) and (2) of §526.21, added by Ch. 57-219, contain the phrases "within the state" and "in this state," but no similar phrase is found in subsection (3) of said section. Does an out-of-state dealer, now licensed, and who has adequate storage in his state to meet the requirements of subsection (3) have to provide storage within this state?

2. Assume that a dealer in an adjoining state has been in business for 12 months prior to May 27, 1957, and applies for a license to serve retail customers in Florida, can he use the provisions of subsection (3) as compliance to obtain a license if the storage installed is within his state and not in Florida?

3. What legal means may be employed to stop an unlicensed out-of-state dealer who has entered Florida with a delivery truck and who is selling gas at the retail level?

4. Several dealers in Florida have established, as part of their operations serving customers, separate filling plants, which are comprised of a tank and pump, in order to fill trailer cylinders (20-pound bottles so called). Are these separate filling plants subject to separate licenses under the law?

Sections 526.12-526.22, F. S., deal with the regulation of dealers, etc., in liquefied petroleum gas. Hence, the "dealers" referred to in the above questions are such dealers as defined in §526.12(3), F. S.

Section 526.21, F. S., was added by Ch. 57-219. Immediately following the title of said chapter and prior to the enacting clause, the legislature made two determinations: (1) The people of this state who rely upon liquefied petroleum gas as a fuel for heat, etc., are entitled to a continuous supply of said fuel for their health, welfare and comfort. (2) Many dealers in liquefied petroleum gas in this state do not have sufficient storage to assist in the maintenance of such supply and as a result thereof the people who rely upon such dealers to furnish gas for fuel are from time to time left without heating or cooking facilities.

Section 526.21 (added by §1 of said Ch. 57-219) provides by its several subsections: (1) All persons, etc., who engage in the distribution of said gas for resale to domestic, commercial or industrial consumers, "as a prerequisite to obtaining an LP gas license, shall install a bulk storage filling plant of not less than

12,000 gallons (water capacity) within the state." (2) Dealers specifically exempt "from the requirements of section 1 hereof" are those dealers who have or enter into a written agreement with a wholesaler that the latter will provide such gas to the dealer for a period of 12 continuous months, provided the wholesaler shall have at least 12,000 gallons bulk storage, "within this state," permanently connected for storage and use as such, for each dealer to whom gas is sold, "provided, however, that no wholesaler will be required under this act to have more than 300,000 gallons (water capacity) permanent storage for their entire operations either retailer or wholesaler in the state." (3) Independent dealers "who do not have a written contract with a supplier or wholesaler are exempt from the requirements of §(1); provided, in lieu of the requirement set forth in §(1), said independent dealers shall install a bulk storage tank with a capacity (water gallons) of not less than the total gas sold by said independent dealer during the peak months of the preceding calendar year." (4) "The location of any bulk storage container or containers shall be approved in writing by the State Fire Marshal before being installed," with further provisions to such containers and the state fire marshal. (5) "A 'wholesaler' as used in this act, is any person, as defined by section 526.12(2), selling or offering to sell any liquefied petroleum gas for industrial, commercial or domestic uses to any person except the ultimate consumer."

Starting with §526.21(1), and traveling through the two succeeding subsections we admit to a certain confusion as result of the several exemptions, provisos and other deviations from the conventional. However, there is the principle that a statute should be so construed and applied as to make it valid and effective, if its language does not exclude such an interpretation; that in construing a statute, the sole object is to discover, disclose and fix its true sense and meaning (*State v. Duval County, Fla.*, 79 So. 692; *State v. DeWitt C. Jones Co., Fla.*, 147 So. 230; *State ex rel Bie v. Swope, Fla.*, 30 So. 2d 748). The abbreviated "LP gas license" in subsection (1) reasonably is construed as license of a dealer in liquefied petroleum gas, as contemplated by §526.12(3) and §526.13. The references in subsections (2) and (3) to "section 1" are reasonably construed as meaning §526.21(1). Even though the storage tank required of "independent dealers" in subsection (3) does not locate it in this state, the subsection is construed as intending that.

In light of the foregoing, in my opinion the questions are answered as follows:

1. The storage tank required of "independent dealers" by the provisions of §526.21(3) must be located in this state.

2. The above response to question 1 furnishes adequate answer to this question.

3. These sections regulating distribution of liquefied petroleum gas constitute an exercise of the police power of the state. Section 526.13, F. S., declares that it shall be unlawful "for any person to engage, in this state, in the business of a dealer in liquefied petroleum gas" without first obtaining the license required by such section. The distribution in this state to ultimate consumers of such gas by an out-of-state unlicensed distributor, would constitute a violation of §526.13, and would subject him to prosecution under the provisions of §526.18, F. S. He would also be subject to the administrative proceedings provided by §526.22, added by

Ch. 57-174, for any such acts committed on and after Oct. 1, 1957, the effective date of said act.

4. In opinion 050-281 (1949-1950 B. R., 481) we held: "Any person who operates more than one place of business in this state wherein is located any of the businesses with respect to which persons are required to be licensed under the provisions of Sections 526.12-526.20, specifically Section 526.13, must pay the licenses required for such business or businesses, as set forth in Section 526.13, for each such location in Florida." To the same general effect see opinion 048-208 (1947-1948 B. R., 260). On the basis of such opinions, this question is answered in the affirmative.

To require dealers in liquefied petroleum gas in other states, selling and delivering such gas to customers in this state from their place of business and tanks in other states, may be an unlawful burden on interstate commerce and unconstitutional; however, in line with the long established policy of this office not to pass on constitutional questions, we leave this question for the determination of the courts.

057-273—September 12, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—EFFECT OF UNREGISTERED INVESTMENT ADVISOR'S CONTRACT WITH MUNICIPALITY—CH. 517, §§517.01, 517.05 AND 517.12, F. S.

To: Florida Securities Commission, Tallahassee

QUESTION:

Where an unregistered investment advisor enters into a contract with a municipality of this state to advise and assist them in floating bond issues and financial arrangements of the municipality, is the contract valid and binding on the municipality?

On Jan. 12, 1957, a resident of Memphis, Tenn., entered into an agreement with a municipal corporation of this state, wherein and whereby the municipality purports to employ the said resident of Memphis "to formulate financial plans suitable to the needs of the city in connection with the utilities improvements now under consideration, . . . the city to furnish the fiscal agent all information necessary, . . . the fiscal agent to employ a reputable New York attorney who will work with the city's attorney, . . . the fiscal agent will pay all his expenses pertaining to the issuance of revenue certificates" including expenses of procuring of the certificates and the printing of necessary prospectus, etc. For the services rendered the city is to pay a sum equal to 1.75% of the par amount of revenue certificates issued. The said fiscal agent, who is a resident of Memphis, appears to be an investment advisor, investment counsel or investment counsellor, within the purview of Ch. 517, F. S., according to §517.01(4)(d), F. S., and is classified as a "dealer" by said subsection and required to register as such before transacting business in this state.

Under §517.12, F. S., no dealer may engage in the sale of securities in this state, including securities exempt under §517.05, F. S., unless he has been registered as a dealer in the office of the securities commission pursuant to Ch. 517, F. S. The fiscal agent here under consideration, although registered as a dealer in 1956,

was not a registered dealer as required when the contract was made and executed on Jan. 17, 1957. The instrument before us seems to contemplate actions and proceedings on the part of the fiscal agent in this state requiring registration under the securities statutes.

An agreement that is violative of a provision of a constitution or statute, or an agreement that cannot be performed without violating such a constitutional or statutory provision, is illegal and void. (Local No. 234, etc. v. Henley & Beckwith, Inc., Fla., 66 So. 2d 818, text 821). As a general rule, all contracts or agreements which, directly or indirectly, involve or have for their object a violation of a law are illegal (17 C. J. S. 545, §191; 12 Am. Jur. 713, §209; annotations in 30 A.L.R. 834; 42 A.L.R. 1226 and 118 A.L.R. 646). It has been held that there can be no recovery for services in the sale of securities by one who has not complied with the securities statutes (53 C. J. S. 778, §77, note 34). Generally unlicensed securities dealers are not entitled to commissions (Blue Sky Law Reports, §2925.06).

The above observations lead to a negative answer to the above stated question. However, part of the contract appears to have contemplated its execution in other states, for example, the employment of a reputable attorney in New York to assist the municipality. This feature of the agreement would seem to indicate that the safer procedure to be followed by the municipality would be the filing of a suit in equity or a proceeding for a declaratory decree to determine the validity of the said contract.

As far as the Florida securities commission is concerned it is suggested that they consider the agreement void because it cannot be carried out by the fiscal agent therein mentioned without violating the Florida Statutes.

057-274—September 12, 1957

CORRECTIONAL SYSTEM

EFFECT OF CH. 57-121 ON GAIN TIME FOR COUNTY CONVICTS—§954.06, F. S. (§954.06 TRANSFERRED TO CH. 951, DEALING WITH COUNTY AND MUNICIPAL CONVICTS)

To: John Lloyd, County Attorney, Ft. Lauderdale

QUESTION:

Did Ch. 57-121, F. S., repeal §954.06, F. S., in toto and abolish gain time for county prisoners?

Section 954.06, F. S., provided, in so far as here material, that "the commissioner of agriculture shall keep a record of the conduct of each prisoner. Commutation of time for good conduct shall be granted by the board of commissioners of state institutions, or in the case of those prisoners known as county prisoners, by the board of county commissioners, and the following deductions shall be made from the term of sentence when no charge of misconduct has been sustained against a prisoner" (Emphasis supplied.) The italicized portion of the above quotation was inserted in the statute by §1, Ch. 19199, 1939. Section 43, Ch. 57-121, 1957, provides that "chapter 952, Florida Statutes, relating to state convicts, and chapter 954, Florida Statutes, relating to the state prison farm, are hereby repealed."

A reading of the title to said Ch. 57-121, reveals an intention to revise, amend and recodify the provisions of the Florida Statutes, relative to state penal and correctional institutions, to state prisoners, and state functions in that connection, but reveals no intent as to county prisoners. We find nothing in the title or in the act itself clearly showing an intention on the part of the legislature to repeal the provisions in §954.06 as to gain time for county prisoners. We find nothing in the legislative journals indicating any intention on the part of the legislature to take from the county prisoners their right to gain time under said §954.06, F. S.

We do not think that the title to said Ch. 57-121, reveals or gives notice of any intention to repeal the portion of §954.06, F. S., relating to gain time for county convicts. The title was not sufficient to give notice to the members of the legislature and other interested parties that the bill, if enacted, would abolish gain time for county convicts. Provisions of an act not covered by the title are usually held to be invalid (*State v. Sullivan*, 99 Fla. 1070, 128 So. 478; *Williams v. Dormany*, 99 Fla. 496, 126 So. 117; *Boyer v. Black*, 154 Fla. 723, 18 So. 2d 886, 153 A. L. R. 869).

We, therefore, feeling that the title to Ch. 57-121 was insufficient to give notice of an intention to repeal the provisions of §954.06, F. S., and there being no evidence of an intention on the part of the legislature to abolish gain time for county convicts, by Ch. 57-121, 1957, hold that §954.06, F. S., in so far as it provides gain time for county convicts, was not repealed by Ch. 57-121 and remains in full force and effect.

This answers the above question in the negative.

057-275—September 13, 1957

PUBLIC HEALTH

FLORIDA STATE HOSPITALS—PERFORMANCE BONDS OF SUPERINTENDENTS IN ADMINISTERING FUNDS FOR PERSONAL USE OF PATIENTS—§§394.121-394.123, F. S., (CH. 57-278)

To: *Leah S. Battle, Board of Commissioners of State Institutions, Tallahassee*

QUESTIONS:

1. Is it mandatory that superintendents of the various state mental institutions give a faithful performance bond?

2. If the 1st question is answered in the affirmative, what should be the amount of said bonds?

Chapter 57-278, provides for the administration as a trust of money for the personal use of patients in the various state hospitals by the superintendents of said institutions. It provides, in §2 of the act, among other things: "The respective superintendents shall give a faithful performance bond, payable to the Governor and his successors in office, in an amount to be fixed by the board of commissioners of state institutions."

Your 1st question is therefore answered in the affirmative.

Your 2nd question is answered as follows: The amount of the bonds must be fixed by the board of commissioners of state institutions.

I am advised by your office that at present the following sums

are involved in the funds in question at the various institutions: approximately \$175,000 at the Florida state hospital at Chattahoochee, approximately \$60,000 at Arcadia, and approximately \$5,000 at the South Florida mental hospital. I assume that these funds will increase, in time, especially in the newer institutions. I therefore recommend that the bond for the superintendent at Chattahoochee be in an amount not less than \$50,000; the bond for the superintendent at the Arcadia institution in an amount not less than \$25,000; and the bond for the superintendents of all other institutions contemplated by Ch. 57-278, be in an amount not less than \$10,000.

The amounts of said bonds will be subject to review and modification at any time by the board of commissioners of state institutions, if the need should arise.

057-276—September 13, 1957

CRIMINAL PROCEDURE

OFFENSES BY PUBLIC OFFICIALS, LIMITATION OF PROSECUTION—§932.06, F. S.

To: *John A. Baker, Chairman, Dade County Grand Jury, Miami*
QUESTION:

Does §932.06, F. S., apply to deputy sheriffs and to municipal police officers of the ranks of patrolmen, sergeants, lieutenants, captains and chiefs?

Section 932.06, F. S., reads as follows:

All offenses by state, county or municipal officials, committed during their term or terms of office, in any way whatsoever connected with the discharge of the duties of their different offices, shall be prosecuted within two years after the said officer shall retire from such office.

There is no distinction in the ordinary and legal use of the words "officials" and "officers" (*Hall v. City of Shreveport, La.*, 102 So. 680, and authorities therein cited). So, when the legislature referred in said statute to offenses by state, county or municipal "officials" committed during their term or terms of "office," in any way whatsoever connected with the discharge of the duties of their different "offices," it intended that the word "officials," as used therein, should have the same meaning as "officers." A deputy sheriff is an officer (*Blackburn v. Brorein*, 70 So. 2d 293, and *Parker v. Hill*, 72 So. 2d 820), and the acts performed by him are as a deputy sheriff of the county (*Parker v. Hill*, *supra*). It follows that he is a county officer or official and that §932.06 is applicable to offenses committed by him during his term or terms of office in any way whatsoever connected with the discharge of the duties of his office.

I also think that §932.06 applies to the municipal police officers mentioned in the above stated question. The supreme court has held that a patrolman on the Miami police department is clothed with sovereign power of the city while discharging his duty and that he is an officer (*Curry v. Hammond*, 16 So. 2d 523). I think that, by the same token, municipal police officers of the ranks of patrolmen, sergeants, lieutenants, captains and chiefs are likewise clothed with sovereign power of the city while they are discharging their duties and are therefore municipal officers or officials to whom §932.06 applies.

Consequently, your question is in my opinion properly answered in the affirmative.

057-277—September 17, 1957

ELECTORS AND ELECTIONS

REGISTRATIONS UNDER §98.281, F. S. ENTITLED SPECIAL
REGISTRATION PROCEDURE, DEPUTY SUPERVISOR
TO HANDLE REGISTRATION—§§98.021, 98.041-
98.151, 98.281, 98.181, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

In light of the provisions of §98.021 and §98.051(1) and (2), F. S., what construction is to be placed upon the provisions of §98.281, F. S., relating to registrations in "settled sections of the county"?

Chapters 97-104, F. S., derived from Ch. 26870, 1951, and by that act are referred to as "The Election Code of 1951." Chapter 98, "Registration Office, Officers and Procedures," a part of said code, deals with the establishment in each county by Jan. 1, 1960, of a permanent registration system, as provided (§§98.041-98.151). To participate in elections after the mentioned date, electors must be registered in such permanent system (§98.131); but where a county has adopted a permanent system by special or population act, if in the opinion of the secretary of state, such a system substantially complies with the mentioned permanent system, the county commissioners of such a county may by resolution adopt the latter system without re-registration (§98.141). Until the required permanent system is adopted, but not later than Jan. 1, 1960, registration systems existing under other general, population or special laws, as conditioned, should remain effective (§98.151).

It is to be observed that with the adoption of the election code, and the establishment of the permanent system by one or more counties, there has existed in this state the following systems: (1) The permanent system provided by §§98.041-98.151. (2) Systems under special or population acts. (3) The system in existence prior to the provision for a permanent system, as features thereof may have been changed by local or general laws.

Sections 98.041-98.151 constitute a revised version of Ch. 25391, 1949, which act established for the first time by general law a permanent system.

Section 98.021 provides that "the registration books in each precinct may if necessary be opened at a convenient place . . . during the month of January in even numbered years . . . *This section shall have equal application to all counties whether or not they have adopted the permanent registration system as provided in Section 98.041 or Section 98.141.*" (Emphasis supplied.) The italicized wording was added by Ch. 29934, 1955. Under the mentioned permanent system, §98.051(2) permits the registration books to be delivered to precinct officers only during the months of January and February of the "first year when the permanent registration system becomes effective." Quite apparently, the mentioned italicized wording qualified this provision of the permanent system.

Section 98.281, F. S., provides that, "Each supervisor may

appoint deputy supervisors to accept registration of those who are qualified in settled sections of the county as may be reasonably necessary. These appointments are in addition to precinct registration officers, who shall accept registration during the time provided in §98.021." It is to be noted that this provision was first adopted as a part of the election code of 1951. Quite reasonably, until the italicized wording in the above-quoted part of §98.021 became effective as result of the 1955 amendment, the provisions of §98.281, tied by its wording to §98.021, without reference to §98.051 (2), had no application to the latter or to the permanent system established by §§98.041-98.151.

We have mentioned that the italicized quoted wording was added to §98.021 by Ch. 29934, 1955. The same act added a new subsection (3) to §98.181, providing, according to its terms, the maintenance in cities of over 25,000 population of a set of indexes or records, when such a city shall not be the county seat, "as will enable the supervisor or the supervisor's deputy to provide all the services to the electors in such city as are provided by the supervisor at the supervisor's office at the county seat." We consider there is a relationship between the obvious legislative intent to afford registration facilities in cities of such size (regardless of the type of registration system employed) and the addition of said italicized quoted words to §98.021.

There is the rule that where in a statute reference is made *generally* to other existing laws, subsequent amendments of such other laws are included in the reference; but if the reference is to a specific statute, such is not true (*Hecht v. Shaw*, Fla., 151 So. 333; *Sutherland*, Statutory Const., 3rd Ed., Volume 2, p. 550, §5208. It is apparent that at its adoption in 1951, the provisions of §98.281 did not apply to registrations under said permanent system. Nevertheless, the wording of §98.021 has remained unchanged except for the 1955 amendment including registrations under the permanent system; and the inclusion in the 1955 Florida Statutes of both amended §98.021 and §98.281 strongly argues that it was and is the legislative intent that the reference in the latter section to the former was and is ambulatory and included subsequent amendments.

In view of the foregoing, in my opinion the question is answered as follows:

Subject to the exceptions stated below, the provisions of §§98.021 and 98.281 apply equally to those counties which have adopted the permanent registration system provided by §§98.041-98.151 and those counties which have not yet adopted such system. The possible exceptions to this statement may be found in those counties which have systems controlled by special or population acts, the provisions of which are such as to exclude the application of either or both of said sections.

057-278—September 17, 1957

TAXATION

LICENSES AND LICENSE TAXES—T.V. SHOWS, T.V. STATIONS—CH. 205, §§205.28, 205.49, 205.59, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are concerns in this state engaged in promoting

television shows by or for local business concerns subject to state and county occupational licenses and license taxes?

2. Is a television station broadcasting such a local television show subject to a state and county occupational license and license tax for the broadcasting of such show?

The above questions arise because concerns of this state are engaged in the business of promoting television shows, which is accomplished by soliciting local business concerns to become sponsors for such shows. The sponsors pay for the privilege of sponsoring such shows, which are arranged for by the promoter with some television station. In exchange for the consideration paid by the sponsors to the promoter, the promoter arranges for television time for the sponsors' shows, gives to the sponsor a predetermined number of "T. V. BUCKS" to be distributed to customers of the sponsors as a trade stimulus. The show itself is a television auction sale of articles of merchandise provided by the show's various sponsors. The television audience may bid by mail on the articles offered for sale, and the "live" audience may bid on such articles in person; in either case the bidders may pay all or part of the bid made with "T. V. BUCKS." The shows appear to be for the benefit of the sponsor as an advertising medium, and for the promoter as a financial gain. It also produces business for the broadcasting station.

The promoter here appears to act as a go-between between the business men and the television station, and may be an independent contractor in the nature of a broker (Anno. in 53 A.L.R. 2d 1145). The authorities seem to hold that the subjection of broadcasters (radio or television) to local taxation will usually be a burden on commerce. (Anno. in 11 A. L. R. 2d 896), in some phases at least. This annotation seems to indicate that a license tax may be required, in so far as *intrastate* commerce is concerned, where the statutes provide for such a tax and the interstate and intrastate business are separable each from the other. It was indicated in *Beard v. Vinsonhaler*, 215 Ark. 389, 221 S. W. 2d 3, that a license tax may be required of broadcasters for transacting an interstate business if the interstate business is expressly exempted from the tax and the business is separable (appeal dismissed 338 U. S. 863, 70 S. Ct. 146, 94 L. ed 529).

It seems clear that the federal communications commission has regulatory power over radio and television broadcasts, under the federal communications act (*Norman v. Century Athletic Club, Inc.*, Md., 69 A. 2d 466, 15 A. L. R. 2d 779; *Pauley v. Federal Communications Com.*, App. D. C., 181 Fed. 2d 292; *K. F. A. B. Broadcasting Co. v. Federal Communications Com.*, App. D. C., 85 Fed. 2d 40; Commission's Reports 11, pp. 211, 812 and 1305). The court in *Gardella v. Chandler*, CCA 2d, 172 Fed. 2d 402, appears to have treated television broadcasts and interstate commerce, and in *Allen B. Dumont Lab. v. Carroll*, CCA 4th, 184 Fed. 2d 153, it was held that such broadcasts constitute interstate commerce (Certiorari was denied in 340 U. S. 929, 71 S. Ct. 490, 95 L. ed 670). Doubtless a large part of television broadcasts in this state constitute interstate commerce and this is especially true where cable service is available from other parts of the U. S.

We deem the promoter mentioned in the 1st question to be

engaged in intrastate business, and not in interstate business, and subject to a license tax under the statutes of this state. Although there may be an auction sale it is evident that script is used instead of money, which script is furnished the bidders without charge or in connection with the purchase of merchandise advertised by the show. The so-called auction sale appears to be a part of an advertising scheme and not a sale of personal property within the purview of §§205.28 or 205.59, *F. S. Dale v. Schleman*, Fla., 59 So. 2d 257, involved an actual livestock auction sale and not an advertising scheme, as is here involved. The said promoter's business is subject to taxation under §205.49, *F. S.*, unless upon further investigation the tax collector feels that such business is more properly classified under some other section of Ch. 205, *F. S.*

We find nothing in the statutes providing for the separation of the interstate and intrastate business of television and radio broadcasters, or for the separation of the functions carried on by such broadcasters, in our taxing statutes which would provide for or permit the separate licensing and taxation of auction shows put on by them, such as the shows in question.

The 1st question is, therefore, answered in the affirmative, subject to the above observations as to the applicable section of the statutes, and the 2nd question is answered in the negative.

057-279—September 17, 1957

ESTATES OF DECEDENTS

ESTATES, APPORTIONMENT OF INHERITANCE TAXES—
EFFECTIVE DATE OF—§734.041 AS AMENDED
BY CH. 57-87

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is §734.041, Florida Statutes, as amended by chapter 57-87, laws of Florida, acts of 1957, applicable to distributions of estates made after the effective date of the said amendment regardless of the date of the death of the decedent?

Section 734.041, *F. S.*, which originated as Ch. 25435, 1949, provided generally that, in the absence of written directions made by the decedent otherwise, inheritance and estate taxes be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom benefits may accrue. Said §734.041, as amended by Ch. 57-87, 1957, changed this rule and requires that such inheritance and estate taxes, in the absence of a direction otherwise in the will of the decedent, be paid from the residuary part of the estate, "without contribution from any person receiving property taxable as a part of the estate of the testator," so long as there be a residuary estate. Where there is no residuary estate, or where the residuary estate is insufficient, payment is required from specific legacies to the extent the residuary estate is insufficient. The said amendment became effective on May 13, 1957.

The fundamental rule of statutory construction is to ascertain and, where possible, give effect to the intention of the legislature in enacting the statute (82 C. J. S. 560, et seq., §321).

There is no invariable rule for the discovery of the legislative intent, but the question must be determined from the peculiar facts and circumstances of each enactment (82 C. J. S. 571, §322). In construing a statute and ascertaining its effect the court may look to the effect to be accomplished, the evils and mischief to be remedied, the purpose to be subserved, and other matters (82 C. J. S. 593, et seq., §323).

"It is an elementary rule of construction that 'a statute is not to be given a retroactive effect, unless its terms show clearly that such an effect was intended'" (*City of Miami v. Board of Public Instruction, Fla.*, 72 So. 2d 901, text 904, and authorities there cited). This same rule is applicable to tax statutes (82 C. J. S. 948, et seq., §396; 84 C. J. S. 695, §361; 61 C. J. 569, notes 24, 25 and 26; 2 Cooley on Taxation, 4th Ed., 1145-1152, and 1156, §§514 and 522).

We find nothing in §734.041, F. S., as amended by Ch. 57-87, 1957, or in connection with the history, facts and circumstances surrounding its enactment, in the evils and mischief, if any, to be remedied, or other considerations of the said act, showing or indicating any intention on the part of the legislature to make the amendment retroactive to estates of persons dying prior to the effective date of the said amendment. We, therefore, hold the amendment applicable only to the estates of decedent dying after the effective date of the said amendment, that is, May 13, 1957, and that it has no effect upon the distribution of estates of decedents dying prior to the effective date of the said amendment.

057-280—September 17, 1957

OFFICES, OFFICERS AND PUBLIC RECORDS

MICROFILM NEGATIVES OF PUBLIC RECORDS—FURNISHING TO BUSINESS ESTABLISHMENTS, COMPENSATION—§§28.24 AND 119.03, F. S.

To: *Arthur W. Newell, Clerk Circuit Court, Orlando*

QUESTION:

May the clerk of the circuit court or the board of county commissioners, or other public officers of a county, furnish abstract companies and similar business establishments microfilm negatives of public records under their possession or control?

Our opinion of Aug. 12, 1957 (057-240) considered the question of furnishing photostatic copies of public records to abstract companies and similar business establishments at and for a consideration differing from that mentioned in §28.24, F. S., and did not relate to microfilm negatives of such records. So far as we are advised neither this office nor any of the courts have considered and answered the above quoted question.

Although we find nothing in §28.24, F. S., or similar statutes and laws, expressly providing for the furnishing of microfilm negatives of public records from which copies of such records may be produced, on the other hand we find nothing prohibiting the furnishing of such negatives. In a broad sense the furnishing of a microfilm negative of a public record is the furnishing of a copy of such record; however, it seems evident that §28.24 and

like and similar statutes providing compensation for the furnishing of copies of public records was never intended to embrace microfilm negatives from which copies of public records may be produced or made. We, therefore, do not construe §28.24, F. S., and similar statutes and laws, as fixing or intending to fix the compensation to a public officer for furnishing a microfilm negative of one or more public records.

We construe §119.03, F. S., as being broad enough to authorize the furnishing of microfilm negatives of public records by public officers having the custody and control of such records. Although said §119.03 would seem to authorize the custodian to agree with the person procuring such negatives as to the compensation to be paid therefor, it is our suggestion that the compensation to be charged be approved by the board of county commissioners. The compensation to be charged should be such as will fully compensate the custodian for his time, for the use of county facilities and equipment, and electricity and other things necessary in that connection. The compensation paid will become a part of the income of the office.

The above question is answered in the affirmative, subject to the above observations relative to compensation.

057-281—September 17, 1957

TAXATION

TAX EXEMPTIONS—KEYSTONE CHRISTIAN FOUNDATION, INC.—§9, ART. IX AND §7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Is the Keystone Christian Foundation, Inc., a nonprofit or eleemosynary corporation of this state, entitled to tax exemption for its property in this state?

2. Are the owners and holders of long time leasehold interests, from the said Keystone Christian Foundation, Inc., in lands in this state, and who reside on and make their permanent homes on said lands, entitled to homestead tax exemption?

Before property in this state may be exempted from taxation, with certain exceptions not here material (see §9, Art. IX, and §7, Art. X, State Const.), it must be held and used exclusively for some religious, scientific, municipal, educational or charitable purpose or purposes. In determining tax exemption under the constitution and statutes of this state we are more concerned with utilization than with ownership alone. (Opinion of June 6, 1957, 057-149). The fact that a corporation may have been organized as a nonprofit or eleemosynary corporation and even though its charter may declare that it was organized for religious, scientific, municipal, educational, or charitable purposes, does not give it tax exemption; there must also be an exclusive use for one or more of such purposes.

The 1st question must be answered in the negative unless evidence be produced to the tax assessor, or is otherwise ascertained by him, showing that the property in question is held and used exclusively for some religious, scientific, municipal, educational or charitable purpose. We have no evidence before

us as to the use of the property and therefore cannot pass upon the nature of the present use of the property.

Leasehold interests for terms in real property are themselves chattels real and therefore personal property and not real property. Being personal property a leasehold interest cannot be the basis for a claim of homestead tax exemption. (Opinion of Dec. 22, 1953, 1953-4 B. R. 312). This answers the 2nd question in the negative.

Under Florida taxing statutes, except where the fee title or reversion is tax exempt, the levy and assessment of taxes is on the realty itself, at its full cash value, regardless of the existence of estates in it (Bancroft Inv. Corp. v. City of Jacksonville, 157 Fla. 546, 27 So. 2d 162, text 167). Unless the title of the Keystone Christian Foundation, Inc. is found to be tax exempt there should be no separate taxation of the leasehold interests.

057-282—September 17, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
INVESTMENTS IN REAL PROPERTY—TRUSTS AS SECURITIES
SUBJECT TO REGULATION UNDER CH. 517, F. S.**

To: *Florida Securities Commission, Tallahassee*

QUESTION: *

An individual or group of individuals, who are the owners seized and possessed of the legal title to real property, make declaration that he or they hold title to the said property in trust for persons contributing to the purchase and maintenance thereof, who are to share in any profits resulting from its management and sale, or either, in proportion to their contributions; are the certificates or declarations of interest in the venture within the purview of Ch. 517, F. S.?

These declarations may generally be divided into two general groups; *first*, those sold to the public, or at least to others than the organizers of the trust, who have little, if any, direction over the administration of the project, and, *second*, those which are issued only to the organizers or original participants in the venture, evidencing the extent of their participation in the venture and its profits. In this class of venture the organizers and participants usually direct and control, often through the trustee or trustees of the property, the administration of the property and investment.

It appears to have been held, without any apparent exception, that documents evidencing a share or interest in a trust, over which the investors have little, if any, control in the administration of the investment, which are sold, or intended to be sold, to the public constitute securities within the meaning of the various blue sky statutes and laws (Anno. in 163 A. L. R. 1090-1093; *La Sage v. Title Guarantee & Trust Co.*, Cal. App. 68 P. 2d 350, affirmed in 12 Cal. 2d 531, 86 P. 2d 115; *People v. Ferguson*, 134 Cal. App. 41, 24 P. 2d 965; *Freeze v. Smith*, 254 Mich. 386, 236 N. W. 810). Here the certificates of interest in the adventure are more in the nature of "certificates of interest in a profit sharing agreement, or the right to participate therein . . ." or "collateral trust certificate, preorganization certificate, pre-

organization subscription, or any transferable share, investment contract or beneficial interest in title to property, profits or earnings . . ." (§517.02(1), F. S.). Here the instrument usually and in effect merely conveys a right to share in the profits to be made from the investment and not title to real property. Here the organizers or the trustee or trustees, with little, if any, regard to the direction or desires of the investors, administer the trust properties and determine when and if sales are to be made. This group of trusts seems to fall within the *first group* mentioned above.

Often two or more persons will decide to pool their funds for the purpose of purchasing real property as an investment, each of such persons putting in a predetermined percentage of the purchase money and the funds needed for administration. Here the administration of the property is the joint concern and direction of the group of investors and not that of the trustees, organizers or other group separate or partly separate from the investors. Each of the investors are truly vested with an undivided title, either legal or equitable, or both, in the property purchased and a share, equal to the percentage of his investment, in the administration of the investment. They, and not some other person or group of persons, determine the manner of administering the property and if and when the same is to be sold. Here the investors, and not the organizers or trustee or trustees, administer the property and determine when and if sales are to be made. This group of trusts seems to fall within the *second group* above mentioned.

Interests in common law business trusts, joint adventures etc. have been held securities under blue sky statutes (Wagner v. Kelso, 95 Iowa 959, 193 N. W. 1; King v. Commonwealth, 197 Ky. 128, 246 S. W. 162; Hemphill v. Orloff, 238 Mich. 508, 213 N. W. 867) where title and control are not vested in the investors. Any interest in real property that does not convey or give a tangible title or interest in the realty and in effect only operates as a right to participate or share in the profits, earnings or distribution of the assets of the enterprise is a security under the blue sky statutes.

No general answer may be framed for the above stated question applicable under all facts and circumstances. The answer depends upon the facts and circumstances involved in each particular case. If the venture, although framed to indicate title in the investors, is in fact an investment scheme where the investor has only a semblance of title at most to the real property and little, if any, control or direction in the administration of the property and its sale, then the interests of the investors should be held to be certificates of interest in profit sharing agreements, or the right to participate therein, or collateral trust certificates, preorganization certificates, preorganization subscriptions, transferable shares, investment contracts, or beneficial interests in title to property, profits or earnings subject to registration. Only when the interest of the investor is actually an interest, either equitable or legal, in real property, subject to the direction and control of the investors, and not some third person or persons, should it be held to be exempt from the securities statutes.

This answers the above question as well as it may here be answered.

057-283—September 17, 1957

VIOLATIONS OF COMMERCIAL RESTRICTIONS
FICTITIOUS NAME STATUTE—CONSTRUCTION OF SUB-
SECTION (5), §865.09, F. S.

To: Samuel A. Harper, Judge, Small Claims Court, Merritt Island
QUESTION:

When is a person, or firm of persons, doing business under a name other than their own name, barred from defending or maintaining suits in the courts of this state under §865.09(5), F. S.?

Section 865.09(5), F. S., provides that "the penalty for failure to comply with this law (fictitious name statute; §865.09, F. S.) shall be that neither the business nor the members nor those interested in doing such business may defend or maintain suits in any court of this state, either as plaintiff or defendant, until this law is complied with" The term "fictitious name," as used in §865.09, F. S., "includes any trade name, whether a single name or a group of names, other than the proper name or known called name of those persons engaged in such business or profession." Section 865.09, makes it unlawful for any person or group of persons to engage in business under a fictitious name unless such name be registered with the clerk of the circuit court as therein provided.

"The object and purpose of statutes which regulate the doing of business under a fictitious or assumed name not showing the names of the persons interested is, in general, to protect the public, to give them information as to the persons with whom they deal, and to afford protection against fraud and deceit It has been held that statutes of the kind under consideration apply to both debtor and creditor, and that their object is not limited merely to the protection of persons giving credit to those doing business under an assumed name." (38 Am. Jur. 603, §14; see also 65 C. J. S. 12 and 13, §9). The rule seems well settled that statutes of the kind under consideration are to be strictly construed, keeping in view, of course, their intended purpose (38 Am. Jur. 603, §14).

Generally, if the name under which a business is transacted gives fair notice of the persons transacting such business, so that persons transacting business with such concern are not left in the dark as to the persons with whom they transact business, or are not misled as to the persons with whom they transact business, then the name would not seem to be a fictitious one (65 C. J. S. 13 and 14, §9). This same rule seems to be evident in the Florida statute, when it provides that a fictitious name includes any trade name, "other than the proper name or known called name of those persons engaged in such business or profession" (§865.09(2)). Where the proper name used in the business name is known to such an extent that its existence in the business name leaves no reasonable doubt as to who operates the business, then there is no fictitious name. The same would seem to be true where a known called name, other than the given and family name of a person, is used in the business name in such a way as to leave no doubt as to who is the operator of the business; for example, the use of a well-known nickname.

A business name does not have to be actually used in such a manner as to mislead or deceive, or intended to be used for such purpose, for it to be a fictitious name within the statute. The question seems to be is the business name such as would be calculated to conceal or fail to reveal the names of the persons operating the said business to the public generally. Where the business name is such as not to reasonably reveal the names of the operators of the said business, then registration is necessary to give notice of the names of such persons.

A person, or firm of persons, doing business under a name other than their own name, is barred from defending or maintaining suits in the courts of this state, under §865.09(5), F. S., when the name under which they transact business is such as does not give reasonable notice of the names of the operators of such business to the public, and such name is not registered as therein provided. This registration is intended as a means of constructive notice when the business names do not give actual notice.

057-284—September 17, 1957

LIQUORS AND BEVERAGES

SPECIAL LICENSES TO RESTAURANTS—CONSTRUCTION OF SUBSECTION (2), §561.20, F. S. AS AMENDED BY CH. 57-773

To: *State Beverage Department, Tallahassee*

QUESTION:

Will restaurants holding special beverage licenses issued pursuant to §561.20, F. S., prior to Jan. 1, 1958, be subject to the proviso in subsection (2) of said §561.20, prohibiting the sale of alcoholic beverages in package for consumption off the premises and from operating as a package store?

Chapter 57-773, 1957, amended subsection (2) of §561.20, F. S., by adding the following to said subsection:

Provided, however, that any restaurant granted special license hereunder shall be prohibited from selling alcoholic beverages in package for consumption off the premises, and from operating as a package store, and provided, further, that the beverage director shall suspend any such license if such restaurant ceases to be a bona fide restaurant as required as a prerequisite for obtaining such license, and providing that no intoxicating beverage shall be sold under such license after the hours of serving food has ceased

This amendment became a law on June 20, 1957, and will become effective on Jan. 1, 1958.

Where there is an amendment to a section of a statute, the amendatory section takes the place of the section amended as a part of the original statute or law (*Singleton v. Larson*, Fla., 46 So. 186, text 190; *Miami Bridge Co. v. Railroad Com.*, 155 Fla. 366, 20 So. 2d 356, text 359; *Stokes v. Galloway*, 61 Fla. 437, 54 So. 2d 799; *Saunders v. Prov. Municipality of Pensacola*, 24 Fla. 226, 4 So. 801). The section as amended is substituted for the former section and becomes for all purposes in the future a part of the original statute or law (*Singleton v. Larson*, *supra*).

"An amended act is ordinarily to be construed as if the original statute had been repealed, and a new and independent act in the amended form had been adopted in its stead, or, as frequently stated by the courts, as far as any action after the adoption of the amendment is concerned, as if the statute had been originally enacted in its amended form" (82 C. J. S. 901-2, §384; see also 50 Am. Jur. 481, §468).

Statutory regulations of intoxicating liquors and the sale thereof "may be increased or withdrawn at the discretion of the legislature, and persons engaged in the liquor business, or about to become engaged therein, do so with full knowledge of the power of the legislature to make further and other regulations as its judgment and discretion shall dictate. It is not a violation of the vested rights of the licensees here to further regulate or cancel the license previously issued" (State v. Fuller, 133 Fla. 554, 134 Fla. 212, 182 So. 888, text 890, 183 So. 726, text 727). Such a licensed liquor dealer "cannot assert that because of an established liquor business he has a vested right over which the legislature is powerless to enact laws regulating or prohibiting the same" (State v. Fuller, 134 Fla. 212, 183 So. 726, text 727). To the same effect see also Brown v. City of Miami Beach, 54 So. 2d 689, text 691 and authorities there cited. While a liquor regulatory statute does not usually operate retrospectively, it may be applicable to the future conduct of a person licensed, or to the future sale of liquor in existence, at the time of its enactment. Such regulatory statutes are enacted in the exercise of the police power, to protect the public health, peace, morals and welfare, and with the purpose and intent to regulate and control the liquor traffic in all its phases. Such statutes are intended to regulate and restrain or restrict, but not to encourage or promote, the sale of liquor (48 C. J. S. 325, §192).

The licensing of the sale of intoxicating liquors in restaurants appears to be designed to permit patrons of the restaurant to have alcoholic beverages with their meals, and the licensing of the sale of intoxicating liquors by hotels, motels and motor courts appears to have been designed to make alcoholic beverages readily available to their guests. It is noted that the statute prohibits the sale of alcoholic beverages by licensed restaurants "after the hours for serving food has ceased;" this seems to affirm the above stated purpose of granting limited licenses to restaurants. The legislature may have well determined in enacting Ch. 57-773, 1957, that public policy dictated that beverages in packages for consumption off the premises be prohibited. "It is presumed that an amendment is made to effect some purpose, which may be either to alter the operation and effect of earlier provisions or to clarify the meaning thereof; it is also presumed that the legislature amends a statute with knowledge of existing statutes and existing conditions of common law and that it does not do a vain thing. The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and the construction of the amended act should be adopted which will repress the evils and advance the remedy . . ." (82 C. J. S. 897 and 898, §384). "A statute as amended, is to be construed as a consistent whole, in harmony with common sense and reason, and every part should be given effect if possible. A part of the amendment must be construed with respect to the

full scope of the amendment, and so as to give it a meaning consistent with the whole" (82 C. J. S. 898, §384).

This brings us to an examination of §561.20(2), F. S., as amended by Ch. 57-773, which amendment inserted as new matter the language above quoted from the said section, and the construction thereof. It is clear from this amendment that it was the purpose of the legislature to limit sales of alcoholic beverages by licensed restaurants to that period of time meals are being regularly served by them and to prohibit the sale by them of alcoholic beverages in packages for consumption off the premises. The provision seems to be one adopted under the police regulatory powers of the state and its legislature, and not merely a regulatory measure. We find nothing in the amendment, or the remainder of the chapter, or any other statute or law of the state, indicating any intention of the legislature to excuse those restaurants licensed prior to the effective date of the amendment from compliance with the provisos inserted in the amendment by the amendment. We find nothing in the amendment in the nature of a grandfather clause as to restaurants licensed prior to the effective date of the act.

It has long been the policy of this office to leave questions of the constitutionality of legislative enactments to the courts; following this long established policy, the foregoing interpretation and construction of Ch. 57-773 is made upon the assumption that such enactment is constitutional. However, we deem it advisable that we point out that there are disturbing considerations relative to the constitutionality of said Ch. 57-773.

First, the title to the act does not expressly indicate that the body of the same prohibits further package sales by licensed restaurant nor does it indicate that sales of beverage drinks by such restaurants are prohibited after "the hours for serving food has ceased." The said title is as follows:

An Act amending Section 561.20, Subsection (2), Florida Statutes, relating to the limitation of number of beverage licenses and exceptions thereto and amending Chapter 561.20, subsection (4) to provide that the limitations herein prescribed shall not affect or repeal any existing or future local or special acts.

Whether a title to an act giving notice that it relates to "the limitation of number of beverage licenses and exceptions thereto," is sufficient to provoke inquiry concerning package sales seems to be a question for the courts, since, as above mentioned, this office does not pass upon the constitutionality of statutes. A limitation of the number of licenses might be considered, when viewed from one angle, as giving notice only of the overall number of licenses that might be issued, or to the qualification of those entitled to secure such licenses, but not to prohibit the practice of package sales theretofore permitted under licenses issued. We give here merely some of the possible arguments tending to raise questions of unconstitutionality, not those tending to sustain the constitutionality of the act.

Second, there is also the constitutional question of reasonable and equal classification and equal protection of the laws, as between licensed restaurants and licensed hotels, motels and motor courts, under said Ch. 57-773. Prior to the amendment by said Ch. 57-773 licensed hotels, motels, motor courts and restaurants were

permitted to make sales of packaged beverages; while after the amendment becomes effective only hotels, motels and motor courts may make such sales, the restaurants will be denied the right to make such sales. In other words, after the effective date of the amendment, hotels, motels and motor courts will not be restricted to sales by the drink as will restaurants. This differentiation raises a question of equal protection and reasonable and equal classification.

Because of these constitutional questions and because of the effect of the act upon the economy of a class who previously enjoyed a privilege which will be denied them by the act, it is my suggestion that the department proceed immediately to file a petition for declaratory decree to obtain a determination of the constitutionality of the act, and in this connection it is suggested that the department select the names of several persons who will be adversely affected by the act as defendants to represent a class. It is suggested that such proceeding be filed immediately so that the constitutionality of the act in question may be determined prior to Jan. 1, 1958, the effective date of the said act.

The above stated question should be and is answered in the affirmative subject, however, to the above suggestions concerning the filing of a petition for declaratory decree.

057-285—September 17, 1957

TAXATION

TAX SALE CERTIFICATES AND TAX DEEDS—WITHDRAWAL OF APPLICATION FOR TAX DEED SALE AND TIME FOR WITHDRAWAL §§194.16-194.23, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Once an application for a tax deed sale is made under §194.15, F. S., may the application be withdrawn by the applicant, and if so, when may the same be withdrawn?

To obtain a tax deed a holder of a tax sale certificate may "file such certificate with the clerk of the circuit court of the county in which the lands described in such certificate are located, notifying the clerk that he desires the lands described therein, or any part thereof capable of being readily separated from the whole, advertised for sale," paying to the said clerk the proper amount necessary to pay all other taxes and tax liens encumbering the property (§194.15, F. S.). Upon the filing of such certificate and application and otherwise complying with the statute, the clerk gives the required notices of the application for tax deed sale and the notice of the holding of said sale (§§194.16-194.20, F. S.). On the day fixed for the sale the clerk proceeds to hold the sale, in accordance with §194.21, F. S., the amount necessary to redeem the said tax sale certificate and subsequent omitted taxes, together with interest thereon and costs to the date of sale, being deemed the bid of the applicant. Others may bid for the purchase of the said lands, but if there be no other bidders the lands will be sold to the applicant for his base bid. The sale is to the highest bid offered for the lands. The tax deed is issued to the successful bidder. Where the lands are sold on a bid in excess of the base bid, the landowner may have an interest in the amount bid (§§194.22 and 194.23, F. S.).

Said §§194.20-194.23, F. S., appear to be a procedure for the foreclosure of the lien of the certificate holder by advertisement and sale. Under the statutes and laws of this state the lien of the tax certificate may also be foreclosed in the circuit court under its equity jurisdiction. The procedure followed in said §§194.20-194.23 bears a close resemblance to foreclosures of mortgages and liens used in some of the states.

An execution is usually considered as the judgment creditor's process and under his control (33 C. J. S. 234-5, §90; 21 Am. Jur. 19, §4). He may be said to have a legal discretion in conducting sales on execution, but such discretion may not be used to work an injustice or wrong (21 Am. Jur. 105, §205). The general rule is that an execution sale must be a public auction sale at which there are bystanders and not a private or secret sale at which only the officer making the sale and the execution creditor is present (21 Am. Jur. 105, §206). It has been held that an execution may be withdrawn from the hands of the sheriff by the holder thereof where such withdrawal will not be injurious to third parties, "but the writ cannot be withdrawn after it has been executed" (33 C. J. S. 235, §90). It has been held by the supreme court of Louisiana (*James J. Reiss Co. v. Spinnato*, 154 La. 9, 97 So. 264), that the holder of an execution may stop the proceedings for collection at any stage when he sees fit. A tax deed sale under §§194.20-194.23, F. S., bears a resemblance to an execution sale and many of the rules applicable to execution sales would seem to apply.

After an application for a tax deed sale has been made the holder of the tax lien would seem to have the right to withdraw his application and call off the sale so long as his action in calling off the same will not injure bidders, third persons or the owner of the land, and providing that he compensate the clerk of the circuit court for his earned fees. In order for the applicant to withdraw the tax deed sale the clerk should require that he give his reasons for the withdrawal. The fact that there are bidders in opposition to the applicant would not be a sufficient reason for withdrawing the lands from sale.

These observations seem to answer the above question as well as it may be generally answered.

057-286—September 17, 1957

FINANCIAL RESPONSIBILITY LAW

ADJUSTERS—CLAIM ADJUSTERS FOR SELF-INSURERS UNDER §324.171, F. S.—§§324.021, 636.24, CH. 636, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Is it necessary for an individual other than a duly licensed attorney, to be licensed as an adjuster when settling claims for a self-insurer as provided in §324.171, F. S.?

Section 324.171, F. S., provides that a person may qualify as a self-insurer, for the purposes of our financial responsibility law, upon issuance to such person by the insurance commissioner of a certificate to that effect, when the latter is satisfied that such person is possessed of net unencumbered capital of at least \$40,000.

Chapter 636, F. S., regulates insurance adjusters of the several classes therein defined. Section 636.24 declares it to be unlawful for any person to hold himself out as an insurance adjuster or claims adjuster or perform any of the functions of an insurance adjuster or claims adjuster unless licensed as provided in said act.

A self-insurer as provided in §324.171, F. S., is not an insurance company or association. "Person" as used in said section is defined in §324.021 as a "natural person, firm, copartnership, association or corporation." The effect of §324.171 is to provide that if such a person shall evidence net unencumbered capital of the amount stated, such shall meet the financial responsibility requirements of Ch. 324. It would be unique indeed to hold that such a person could not "adjust" his or its own affairs without the intervention of licensed authority.

In view of the foregoing, in my opinion, the question is answered as follows:

A "self-insurer" under §324.171, F. S. is not an insurer within the meaning of Ch. 636. In the event of an accident within the purview of Ch. 324, any such person certified as a self-insurer may adjust his own losses as provided: if the self-insurer is a natural person he may adjust such losses; if a partnership is the self-insurer, any partner may adjust such losses; if an association or corporation, any officer or employee thereof may adjust such losses, provided that in negotiations in connection therewith, such officer or employee does not attempt to function in the field of the practice of law. If a third party is retained by a self-insurer, other than a lawyer, to adjust any such loss, such person, of course, must be licensed under Ch. 636, F. S.

057-287—September 17, 1957

INSURANCE

DEPOSITS WITH INSURANCE COMMISSIONER UNDER
§§631.06 AND 648.02, F. S.—§§631.09, 648.10
AND 648.11, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTIONS:

Sections 631.06 and 648.02, F. S. were amended during the 1957 session by the provisions of Ch. 57-100, effective July 1, 1957. The following questions are related to such amended sections:

1. If a company already licensed in Florida has a deposit of \$75,000 with the insurance commissioner, may such deposit be released to the company upon submission by the company of a certificate of deposit from its home state insurance department, showing that the company has a deposit of \$75,000 or more, for the protection of all policyholders of such company?

2. In case of a company applying for permission to write fidelity and surety lines in Florida (§648.02, F. S.), will a certificate of deposit as mentioned above be sufficient for the insurance commissioner to grant authority to such company, or should the commissioner require the \$75,000 deposit to be made with him?

3. Where a Florida resident has a claim against a company arising under either of the above sections, may the claim be taken up directly with the Florida department, or must the Florida resident seek assistance from the insurance commissioner in the state in which such company maintains its voluntary deposit?

4. Where a company has a voluntary deposit in its home state of, say, \$200,000, will such voluntary deposit cover the requirements of both §631.06 (\$50,000) and §648.02 (\$75,000), or will the company be required to maintain separate voluntary deposits under each section?

Certain of these questions in relation to amended §631.06 were answered in opinion 057-218. A copy of that opinion is attached and to avoid useless repetition, reference is made to it. The last paragraph of that opinion cautioned that nothing in it should be determinative of the effect of the amended §648.02 by §8 of Ch. 57-100. There was sound reason for that statement.

Prior to its amendment, §648.02, F. S., required surety companies, as a prerequisite to engaging in business in this state, "to deposit with the insurance commissioner of this state bonds of the United States or of any state of the said United States," in the market value of \$75,000. Sections 648.10 and 648.11, F. S., were not amended. The effect of these sections is that the deposit so required was for the benefit of claimants under Florida contracts. On this point, it is to be noted that §631.06, F. S., and also §631.09, F. S., were amended to the extent and as set forth in opinion 057-218.

Section 648.02, as amended by Ch. 57-100, now provides, for the purposes of this opinion, the following: (1) That such \$75,000 deposit "shall be for the protection of all holders of (the company's) bonds and creditors"; that if any of the bonds so deposited be registered bonds the company shall, at the time the deposit is made, "give to the insurance commissioner, a power of attorney authorizing him to transfer said bonds, or any part thereof, *for the purpose of paying any of the liabilities provided for in Chapter 648, Florida Statutes.*" (Emphasis supplied.) (2) Annual assurance, as specified, that the securities deposited have a market value to and in excess of \$75,000. (3) The state shall be responsible for the safekeeping of such bonds and the same "shall be held exclusively and solely for the protection of all holders of its bonds and creditors." (4) A foreign surety company may meet the requirements of the section by making such \$75,000 deposit "with the insurance commissioner or other officer of the state of domicile or the insurance commissioner or other officer of another state, designated or permitted by the laws of such state to receive such deposit for the benefit and protection of all the holders of its bonds and creditors"; and the furnishing to our insurance commissioner of certificate of deposit of such securities, as provided.

At this point we recapitulate. Section 648.02 is amended to change such deposit as security for the benefit of Florida holders of contracts to "all holders of its bonds and creditors." Section 648.10, F. S., (not amended) provides for relief of a judgment creditor out of such deposit in the manner specified. Section 648.11 (not amended) affords a formidable aspect of confusion: It still provides that in event of adjudication of insolvency of any surety company, or if its assets be placed in liquidation in the state of its incorporation, the Leon county circuit court shall have jurisdiction

to administer said deposit and, after providing for costs, "distribute the proceeds of the sale of said securities proportionately among all of the Florida creditors," as provided.

In contrast to the provisions of §648.11, reference is made to amended §631.09 in relation to the \$50,000 deposit required by amended §631.06. A certain awkwardness which will require construction if the occasion ever arises is found in amended §631.09(2): Whereas, in the case of insolvency such deposit is for the benefit of all holders of its policies, the \$50,000 deposit (which we presume is a situation where the deposit is held by the Florida commissioner) is to be administered in the Leon county circuit court.

This obvious conflict between amended §648.02 and §648.11 invokes rules of construction. Section 10 of Ch. 57-100 provides that "all laws and parts of laws in conflict herewith are hereby repealed." The words, of course, merely announce the principle of repeal by implication. The courts are reluctant to invoke repeal by implication (*State v. Gadsden County, Fla.*, 58 So. 232; *Scott v. Stone, Fla.*, 176 So. 852). However, when irreconcilable conflict exists between statutes the last enacted must prevail (*Stewart v. De-Land-Lake Helen Sp. Road & Bridge Dist., Fla.*, 71 So. 42; *Tamiami Trail Tours v. Lee, Fla.*, 194 So. 305). The extent to which provisions of §648.11 are in conflict with the words and intent of amended §648.02 must yield to the latter.

On the basis of the authority and reasoning in opinion 057-218 in relation to amended §631.06, and as therein conditioned, deposits of \$75,000 at July 1, 1957, of surety companies with the commissioner under provisions of former §648.02 may be surrendered to the companies which made such deposits upon such companies' compliance with the provisions of amended §648.02, and subject to the comments set forth below.

In view of the foregoing, the questions are answered as follows:

1. We quote the following excerpts from opinion 057-218:

Deposit of such \$50,000 in securities with officials of another state will meet the requirements of amended §631.06 only if under the laws of the state where the deposit is made a Florida judgment obtained on a policy is payable out of such deposit by the filing with the appropriate official of such other state duly authenticated records thereof without necessity of proceedings in such other state.

The Insurance commissioner is authorized to deliver back to the depositing insurers the \$20,000 deposits made by them under §631.06 prior to July 1, 1957; provided, that if any judgment holder prior to such date applied to the insurance commissioner for satisfaction out of such deposit, and such was not accomplished by said date, the deposit should be retained (or surety bond remains liable) until that is done.

These conditions are applicable equally to the deposits respectively required by amended §§631.06 and 648.02, and furnish answer to this question; provided, the deposit in such other state is specifically for protection of holders of surety contracts and creditors contemplated by Ch. 648.

2. The preceding answer is responsive to this question.
3. If the 1st essential condition quoted in the answer to the

1st question is observed, such will furnish appropriate answer to this question.

4. Subject to other conditions mentioned above, in response to this question, attention is directed to the opening words of respective amended §§631.06 and 648.02:

Every fire insurance company, title insurance company, including reciprocal or inter-insurance exchanges. . . ." (Emphasis supplied.)

Every surety company, now or hereafter doing business in this state who offer (sic) or undertake (sic) to become surety upon any bond or other surety contract. . . ."

The italicized words in the quoted provision from amended §631.06 are construed to mean that where one company is engaged in the fire, title and/or casualty insurance business, *one* deposit of \$50,000 is required for such company. We are not interested here with voluntary deposits, as such, in other states. We are interested in a certificate from the proper officer of another state, as required by amended §631.06(4) that a particular company engaged in the fire, title and/or casualty insurance business has deposited with such officer not less than \$50,000 of securities of the type or types described in §626.25, F. S., "for the benefit and protection of all its policyholders;" and the word "policyholders" is construed as meaning holders of policies of fire, title and/or casualty insurance (and no other types of policies), depending upon the lines written by the particular company.

The same reasoning is applicable to the \$75,000 deposit required by amended §648.02 of surety companies, and the certificate of the proper officer of another state, as contemplated by §648.02(4).

057-288—September 17, 1957

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—VOLUNTEER FIREMEN, USE OF FLASHING RED LIGHTS ON PRIVATE VEHICLES—CONSTRUCTION OF CH. 57-781—EMERGENCY VEHICLES AS DEFINED IN §371.01(1), F. S.

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTIONS:

1. Do privately owned vehicles belonging to the active fireman members of regularly organized volunteer fire-fighting companies or associations, while en route to scenes of fires or other emergencies, become emergency vehicles as defined in §317.01(1), F. S., 1953, and come under §317.04(4) as to their operation while en route to the scene of a fire?

2. Is this department which has in the past approved as emergency vehicles the firefighting equipment of volunteer fire departments, but not the privately owned vehicles of the members, under §1(7), Ch. 57-781, relieved of approving any vehicles, either association or privately owned as emergency vehicles?

AS TO QUESTION 1:

Section 317.01(1), F. S., defines authorized emergency vehicles within the contemplation of the law regulating traffic on the public highways as:

Vehicles of the fire department (fire patrol), police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by the director of the department of public safety or the chief of police of an incorporated city.

Chapter 57-781 authorized the location and use of flashing red lights on the front and back of privately owned vehicles belonging to volunteer firemen when responding to an emergency. Nowhere in the act are such vehicles defined or referred to as authorized emergency vehicles, nor does such act infer that such vehicles shall be exempt from the operation of the traffic laws as is contemplated by §317.04(4) F. S. for authorized emergency vehicles. The act is a mere grant of authority to use flashing red lights under certain circumstances. It does not exempt volunteer firemen from the operation of the law regulating traffic on public highways.

The use of such lights on such vehicles will no doubt serve many salutary purposes without the necessity of relieving the operator from the necessary requirements of the traffic laws. Such lights, when in operation under the proper circumstances, will provide sufficient indication to other motorists of the wisdom of yielding the right of way. They may also serve to furnish law enforcement officers at the scene of a fire with the knowledge that such vehicle is being operated by a volunteer fireman and should be permitted to park in the near vicinity.

At this juncture it may also be well to note legislative approval for another class of persons to employ the use of flashing red lights on their privately owned vehicles. Ch. 57-172 authorized the use of such lights on the privately owned vehicles of rural mail carriers when operated for the purpose of delivering mail. It is the writer's opinion that the impelling reason for this grant of authority was to mitigate the safety hazard which arises from the necessity of a rural mail carrier to make frequent stops on public highways at places where it is not always possible to park the vehicle completely off the highway. Here again is an example of authority for the use of flashing red lights on a vehicle not classified as an authorized emergency vehicle.

AS TO QUESTION 2:

Inasmuch as Ch. 57-781, *supra*, did not classify such vehicles as authorized emergency vehicles, the authority and responsibility of the department of public safety to designate authorized emergency vehicles contemplated by §317.01(1), *supra*, is unaffected.

Section 1(7), of Ch. 57-781, merely authorizes the chief executive officers of a volunteer fire organization to issue a permit for the use of a flashing red light on the vehicle of a volunteer fireman. It does not authorize such officer to classify such vehicle as an emergency vehicle within the contemplation of Ch. 317, F. S.

Your questions are answered accordingly.

057-289—September 17, 1957

**REGULATION OF PROFESSIONS AND VOCATIONS
FLORIDA BASIC SCIENCE BOARD OF EXAMINERS—
AUTHORIZED USE OF FUNDS—ESTABLISHMENT
OF STUDENT LOAN FUND—CH. 456, §456.17, F. S.**

To: Harry G. Smith, Budget Director, Tallahassee

QUESTION:

Can the state board of examiners in the basic sciences legally establish scholarships or a student loan fund for use of students in the college of medicine at the university of Florida and at the university of Miami?

STATEMENT OF FACTS:

It appears in a letter dated Aug. 29, 1957, from M. W. Emmel, secretary of the board of examiners in the basic sciences, that the board desires the budget commission's approval to use \$7,000 of its reserve funds to establish a basic science student loan fund in the sum of \$3,500 each to the college of medicine at the university of Florida and the university of Miami. The fund would be administered by each college and awarded to junior or senior students on the basis of academic record and financial need. The loans would bear no interest until graduation, then at the rate of 5% until the loan was paid.

I do not find any statute in the Florida basic science law, being Ch. 456, F. S., or otherwise that authorizes the board of basic science examiners to use its funds in the aforementioned manner.

Section 456.17, F. S., relating to the board provides as follows:

All fees collected shall be accounted for by the secretary and shall be deposited in the state treasury to the credit of the state agencies fund. Members of the board shall receive ten dollars per day, or any part of a day, while attending official board meetings, not to exceed twelve meetings per year, and shall receive per diem and mileage as provided in §112.061, from place of their residence to place of meeting and return, together with the expenses of the secretary in maintaining the records and other necessary clerical and office expenses shall be approved by the board. All bills and expenses shall be audited and paid by the state comptroller upon requisition of the secretary of the board approved by the chairman of the board. Sufficient funds for the administration of the provisions of this chapter shall be included in the biennial appropriations act.

In view of the foregoing statute which designates the disposition of fees and funds appropriated to the board of examiners in the basic sciences, I do not believe it is authorized to use any part of said funds to set up the proposed student loan fund. It is well established that licensing and regulatory boards, such as the said board, have only such authority as is delegated to them by law. It, therefore, appears that it is necessary for the legislature to authorize the board to spend its funds awarding scholarships or in a student loan fund program.

057-290—September 17, 1957

**REGULATION OF PROFESSIONS AND VOCATIONS
REAL ESTATE LICENSE LAW—EFFECT OF CH. 57-244 ON
CERTAIN POPULATION AND SPECIAL ACTS**

To: *Benjamin T. Shuman, Counsel, Real Estate Commission, Orlando*

QUESTIONS:

1. Does Chapter 57-244, 1957, repeal the following acts:

Chapters 31453 (amending Ch. 30254) and Ch. 31486, extraordinary session acts, 1956-57, Chs. 30347, 30346, 30254, 1955, Chs. 28698, 28482, 1953, Chs. 27130, 27008, 1951, Ch. 23120, 1945?

2. Does Ch. 57-244, *supra*, repeal Ch. 30960, special acts of 1955?

Chapter 57-244, amended certain sections of Ch. 475, F. S., relating to the practice of real estate in Florida.

A check of Chs. 31453, 31486, extraordinary session acts, 1956-57; Chs. 30347, 30346, 30254, 1955; Chs. 28698, 28482, 1953; Chs. 27130, 27008, 1951; and Ch. 23120, 1945, reveal that each of said chapters, also relating to the practice of real estate, were enacted prior to the passage of Ch. 57-244, *supra*, and that same are population acts and were passed as general laws. A check of the legislative journals does not show that any of said acts were advertised or passed as special acts.

Therefore, without any comment or regard as to the constitutionality of said acts or whether they are in fact local laws, for the purposes of this opinion we will have to hold that said acts were passed as general laws and are construed as general laws until the court rules otherwise (*Waybright v. Duval County* 196 So. 430).

The legislature may classify counties for governmental purposes according to population for the purpose of enacting general laws and where a proper reasonable classification is made according to population, or otherwise, statute may be regarded as a general law and not as a special or local law, although the result is an act the operation of which is confined to a single county falling within the population classification (*State ex rel Baldwin v. Coleman*, 148 Fla. 155, 3 So. 2d 802).

Classifications of counties for governmental purposes based on population are permissible in enacting general laws (*State ex rel Buford v. Daniel*, 87 Fla. 270, 99 So. 804).

It, therefore, appears that wherever there may exist any conflicts between Ch. 57-244 and Chs. 31453, 31486, extraordinary session acts, 1956-57; Chs. 30347, 30346, 30254, 1955; Chs. 28698, 28482, 1953; Chs. 27130, 27008, 1951; and Ch. 23120, 1945, that the provisions of Ch. 57-244 will control as the last general law enacted on the subject. It also appears that for the purposes of administering Ch. 57-244 it may be assumed that the provisions of Chs. 31453, 31486, extraordinary session acts, 1956-57; Chs. 30347, 30346, 30254, 1955; Chs. 28698, 28482, 1953; Chs. 27130, 27008, 1951; and Ch. 23120, 1945, relating to the subject matters

covered by Ch. 57-244 are repealed. Your 1st question is answered accordingly.

Replying to your 2nd question it appears that Ch. 30960, *special acts of 1955*, is not repealed by the general law, Ch. 57-244, on the basis that a special act is construed as an exception to the general law and should be specifically repealed.

057-291—September 17, 1957

TAXATION

TAX EXEMPTIONS—CHARITABLE HOSPITAL TRUSTS—CH. 57-816, §192.06(3), F. S. AND §1, ART. IX, STATE CONST.
To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where property having its situs in this state is vested in trustees, established by the last will and testament of a resident and citizen of this state for a term of not less than 99 years, to be administered, used and rented, with the rents therefrom being used, in the establishment, maintenance and operation of a charitable hospital in this state, is such property in the hands of the said trustees entitled to tax exemption?

Under Ch. 57-816, "real property held and used for the production of income, and for no other purpose, by a testamentary trust for a term of not less than ninety-nine years duration, established by will, probated and administered under the laws of Florida, for the purpose of constructing and operating a charitable, nonprofit hospital or hospitals, within the state, provided such income is applied exclusively to the nonprofit charitable hospital purposes specified in said will, and provided, however, that such exempted property shall not exceed five thousand acres in any one county," is entitled to exemption from ad valorem taxes.

Section 1, Art. IX, State Const., was construed in *L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250, *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134, and *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304, "as a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes in the organic law itself." The classes mentioned in the organic law is property held and exclusively used for "municipal, education, literary, scientific, religious and charitable purposes." It is not the character of the trust that alone determines the right to exemption, but the use of the property for which exemption is claimed that determines exemption (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870, text 871; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134).

It was held in *State v. McDavid*, 145 Fla. 605, 200 So. 100, text 102 and in *Saunders v. Jacksonville*, 157 Fla. 240, 25 So. 2d 648, text 649, that "what constitutes a municipal purpose is a legislative question that should not be interfered with by the courts in the absence of a clear case of abuse of discretion." This same rule appears to have been followed in construing §192.06(3), F. S., as to what constitutes an educational, literary, benevolent, fraternal,

charitable or scientific purpose (State v. Doss, 150 Fla. 846, 8 So. 2d 15, and other cases). The provision in said subsection (3) providing that rental of not more than 75% of the floor space of property held by a charitable, educational, literary, benevolent or fraternal institution or corporation, may be deemed to prevent such institution or corporation being granted tax exemption where the funds derived from such rental are used exclusively for some charitable, educational, literary, benevolent or fraternal purpose. However, where such rentals are not used for such purposes, or one or more of them, exemption should be denied (Simpson v. Bohon, 159 Fla. 280, 31 So. 2d 406). In this case the rental moneys were being used to pay off a mortgage on the lodge building of a fraternal association, which was held not to be a purpose within the purview of §1 Art. IX, State Const.

Chapter 57-816, above mentioned, appears to be in the nature of an extension of §192.06(3), F. S., and so construed appears to be within the purview of §1, Art. IX, State Const., and not in conflict therewith so long as the income from the said trust is used for one or more of the purposes mentioned in said §1 of Art. IX. The fact that the trustee may be given power to sell and dispose of property of the trust and reinvest the proceeds, or any part thereof, of such sales would not make it any less trust property within the purview of said Ch. 57-816, so long as the trust and its properties generally were designed to extend beyond 99 years. The fact that the trustee may be given a power of sale over the trust properties and may thereunder sell and convey real property of the trust within the 99 year period would not seem to deny the property tax exemption merely by reason of such power of sale. We feel that the phrase "by a testamentary trust for a term of not less than 99 years" has reference to the term of the trust and its properties generally without taking into consideration possible contingencies. Real property of the trust, to be entitled to tax exemption, must be used for the production of income and such income must be used for some one or more of the purposes mentioned in §1, Art. IX, State Const., in connection with the operation of a "nonprofit charitable hospital," which purposes must also be one or more of the purposes mentioned in the will.

Whether or not the income from the trust fund within the purview of Ch. 57-816, is being used for one or more of the purposes mentioned in §1, Art. IX, State Const., and in accordance with the requirements of said Ch. 57-816, is a question of fact which must be determined by the tax assessor from evidence available or made available to him. Unless and until it is apparent to the tax assessor that such income is being used exclusively for such purposes exemption should not be granted. We do not deem it necessary that the information and evidence to be acted on by the tax assessor be in written or documentary form; it may be obtained by him by observation or by oral testimony of others. One method of obtaining such information would be by examination of the books and records of the trust or audits of such trust. The tax assessor, except where otherwise directed by a court of competent jurisdiction, need only reveal his conclusion as to the taxability or nontaxability of the property and the taxable values to be placed thereon. He need not and probably should not reveal other information coming to his attention in determining the taxability of the property in question.

The above question should be answered in the affirmative, subject to the above observations and limitations.

057-292—September 17, 1957

**COUNTY ORGANIZATION, OFFICERS, AND REGULATIONS
POWERS OF COUNTY COMMISSIONERS TO ESTABLISH:
STANDARDS FOR SUBDIVISION PLATS AND FOR CON-
STRUCTION OF ROADS BUILT BY PRIVATE DEVELOPERS—
REGISTRATION OF COUNTY ENGINEERS—§5, ART. VIII,
STATE CONST.—§336.02 AS AMENDED BY CH. 57-776**

To: *David C. Gaskin, County Attorney, Wewahitchka*

QUESTIONS:

1. Can the board of county commissioners, without benefit of special legislation, adopt a resolution requiring subdivision plats to meet standards in excess of those required under the general laws of Florida?

2. Does the board of county commissioners have the authority to fix minimum standards for road construction on roads and streets built by private developers?

3. Is it necessary for a county engineer, an engineer hired by the county to locate roads and streets, to be registered with the Florida engineering society or approved by the state board of engineering examiners?

AS TO QUESTION 1:

Boards of county commissioners in this state have no powers other than those expressly vested in them by statute, or that must be necessarily implied to carry them into effect (§5, Art. VIII, Fla. Const., *Crandon v. Hazlett* 26 So. 2d 638, Text 642).

Question 1 is answered in the negative.

AS TO QUESTION 2:

The County commissioners are invested with the general superintendence and control of the county roads and structures within their respective counties, and may establish new roads, change and discontinue old roads, and keep the same in good repair in the manner herein provided. They shall be responsible for establishing the width and grade of such roads and structures in their respective counties (Ch. 57-776).

The above quoted chapter amending §336.02, F. S., 1955, pertains to those roads within the county known as the county road system and clearly vests the county commissioners with general control of such roads.

Florida highway code, 3rd part, §336.01, defines county roads as public roads outside a municipality, not included in the state highway system or state park road system, and such municipal connecting links and extensions as may be agreed upon by the board of county commissioners and municipal authorities.

The county commissioners' certification of approval being placed upon a map or plat of a subdivision does not constitute a binding acceptance of roads dedicated by the plat and, until a valid acceptance of the dedication of such roads is made by the county commissioners, said roads seem not to be a part of the county road system. However, the general statutory powers and duties of the county commissioners require them to build and

keep in repair county buildings, roads and bridges, (Section 125.01(1), F. S., 1955).

In the light of this statutory duty and the powers granted to county commissioners under the above quoted sections of the Florida highway code, it would seem that the county commissioners would have the ultimate duty of maintaining roads and streets built by private individuals of subdivisions in the county, when such roads, streets, as dedicated, have been accepted by the county.

In view of this future maintenance, it is my opinion that the board of county commissioners may establish reasonable minimum standards of construction for roads and streets built by private individuals in subdivisions within the county.

Question 2 is answered in the affirmative.

AS TO QUESTION 3:

We herewith enclose attorney general opinion 050-235 in which question 3 is answered in the affirmative.

057-294—September 17, 1957

REGULATION OF PROFESSIONS AND VOCATIONS

PUBLIC ACCOUNTANTS—EXAMINATIONS—PRESERVATION OF PAPERS BY BOARD—CH. 473, F. S.

To: *Clifford C. Beasley, State Board of Accountancy, Gainesville*
QUESTION:

There being no stipulation in Ch. 473, F. S., requiring the state board of accountancy to retain answers to examinations administered by the board, are there any statutes which might govern, and if so, for how many years is the board responsible for having on file and available to an applicant the answers to certified public accountant examinations?

An examination of Ch. 473 relating to the state board of accountancy does not reveal any statute requiring the board to keep the examination papers of persons examined by the board. I do not find any other statute requiring same.

It may be of help to you for me to point out that a relevant case, *State ex rel v. Pearson et al*, 61 So. 2d 325, has been decided by the Florida supreme court wherein the Florida state board of medical examiners was asked to produce in court the examination papers of an applicant for a medical license. The board pled that it could not do so as the papers had been destroyed since the law did not require the board to keep them. The court ruled with the board in that it could not produce something it did not have, and that the law did not expressly require the board to keep the papers.

In a similar case, *York v. State ex rel Schivaid*, 10 So. 2d 813, involving the dental board of examiners the court ruled against the board because the law required the board to keep the examination papers and the said board had destroyed them.

In view of these decisions of the supreme court and the fact that the law does not require the state board of accountancy to

keep the examination papers of applicants for licensure, I believe it is discretionary with the board as to how long it sees fit to keep them. If facilities will permit I believe it would be good policy for the board to keep the papers for a reasonable time which should include the period through the next succeeding examination and a reasonable time for appealing the board's decision to the court. In view of the fact that the board gives two examinations per year, it appears that it would be reasonable and good policy to keep the papers for a period of one year.

I believe the foregoing answers your question.

057-295—September 18, 1957

CRIMINAL PROCEDURE

CRIMINALS—REGISTRATION OF CONVICTED FELONS— CHS. 57-19 and 57-371 (§775.13, F. S.) EXEMPTIONS

To: *Flanders Thompson, Sheriff, Lee County, Ft. Myers*

QUESTION:

Do parolees and probationers under federal jurisdiction and now reporting to federal probation officer come under exemptions as state parolees under §775.13 (5) (d), F. S.?

Chapter 57-19, as amended by Ch. 57-371, F. S., and which went into effect July 1, 1957, makes provisions for the registration of previously convicted felons who are now present in, or who may later come to Florida.

The statute imposes the duty of registration on previously convicted felons from all jurisdictions, state, sister states, federal and foreign within 48 hours of entry into Florida.

However, the statute is not so broad in setting forth the exemptions to registration. Section 775.13(5)(d), F. S., reads as follows, with reference to certain persons exempt:

(5) The provisions of this law shall not apply to any person who:

(d) Is a parolee or probationer under the supervision of the Florida parole commission, or is a probationer under the supervision of any county probation officer of this state, or who has been lawfully discharged from such parole or probation.

It therefore follows that there is no provision in the new statute which specifically exempts a parolee or probationer under federal jurisdiction. While this was a probable oversight on the part of the legislature, and the omission of the exemption embodied in your inquiry will no doubt operate as an inconvenience to those federal parolees and probationers in our state who are exercising a conscientious effort to lead upright and useful lives, still, we must of necessity hesitate to read something into the statute which does not appear upon its face, and thereby inappropriately enlarge upon the legislative directive.

Your question as presented is therefore answered in the negative.

057-296—September 17, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

**SALE OF SECURITIES—LISTING ADDITIONAL PERSONS
CONNECTED WITH SALES IN EXEMPT TRANSACTIONS,
§§517.06(8), (15), F. S.**

*To: J. Edwin Larson, Chairman, Florida Securities Commission,
Tallahassee*

QUESTION:

May additional names of persons, who will be connected with an offering of a security in an exempt transaction, be added by supplemental notice subsequent to the original filing of notice of such offering with the Florida securities commission?

The uniform sale of securities law requires that written notice be given the Florida securities commission in advance of the sale of securities in certain exempt transactions. Said notice requires the names of all persons to be connected with such offering be placed on file with the Florida securities commission (§517.06(15), F. S.).

It is fundamental that where a construction may be given a statute which might lead to absurdity in the application of said statute and another construction might be given the same statute which would lead to a practical application of the statute, the latter construction should be given, for the acts of the legislature were not intended to result in absurd situations (*Smith v. Ryan*, 39 So. 2d 281).

By the very nature of things, employees of employers who may properly sell a security in transactions exempt by the provisions of §517.06(8), F. S., may discontinue their employment and new employees may be hired to replace them. There may also be occurrences, such as death or illness, which may necessitate the employment of additional persons. There may also be reason to employ additional employees as a result of expanding economic conditions.

The language of §517.06(15), indicates an intent on the part of the legislature that notice of the offering, as well as the listing of persons connected with such offering, be placed on file with the Florida securities commission. This section requires nothing more. I am of the opinion that additional persons, who will be connected with an offering sold in an exempt transaction under §517.06(8), F. S., may be made subsequent to the original notice of such offering filed with the Florida securities commission prior to sale of such securities. The securities commission may prescribe a proper form to be used to amend the original notice of the offering.

As to successive filings of promissory notes secured by separate first mortgages encumbering separate tracts of land, see A. G. O. 056-270, as corrected by opinion 057-85, copies of which are enclosed herewith.

057-297—September 17, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY HOSPITALS—SHOWING OF CASH-ON-HAND BAL-
ANCE IN COUNTY HOSPITAL TRUSTEES' ANNUAL
REQUEST FOR FUNDS—§155.12, F. S.**

To: Robert L. Howell, Clerk of Circuit Court, Apalachicola
QUESTION:

Can the county commissioners require a showing of cash-on-hand balance remaining in the county hospital fund in the hospital trustees' annual request to the county commissioners for funds necessary to the maintenance and operation of the county hospital?

Section 155.12, F. S., provides in part that the board of hospital trustees file with the board of county commissioners of said county a report of their proceedings with reference to such hospital and a statement of all receipts and expenditures during the year and shall certify to the said board of county commissioners the amount necessary for the improvement and maintenance of such public hospital, so established during the ensuing year.

Said statute further provides that the board of county commissioners shall, at its annual meeting for the purpose of determining the amount to be raised for all county purposes, levy a sufficient tax upon all the assessed value of the taxable property in the county, as will produce the sum required by the said board of trustees' report.

The provision of the statute requiring a statement of all receipts and expenditures during the year, to be filed with the board of county commissioners, requires the filing of a complete financial statement of expenditures in connection with the maintenance and improvement of the county hospital. Such statement, to be a correct report of receipts and expenditures would, by the very nature of things, require the showing of any beginning cash balance and any cash on hand at the end of the fiscal period covered by said statement.

The provision of the statute that the hospital trustee certify to the board of county commissioners, the amount necessary for the improvement and maintenance of the county hospital during the ensuing year, requires that the amount actually necessary for the hospital fund be certified and the statute also requires this amount so certified be used by the board of county commissioners in determining the amount of money to be raised for all county purposes by the levying of a tax upon the assessed value of all taxable property in the county.

The purpose of this section is to provide the necessary funds for the operation and maintenance of a county hospital during each year and not to provide a method of accumulating a hospital fund over a period of time.

It is my opinion that the county commissioners, being charged with the duty of determining the amount of tax levy necessary to raise funds for all county purposes, may properly require the county hospital trustees to show any cash on hand balance remaining in the hospital fund in the trustees' annual request to the county commissioners for funds necessary to the maintenance and operation of the county hospital.

057-298—September 18, 1957

CRIMINAL PROCEDURE

APPEARANCE BOND, PERIOD OF EFFECTIVENESS—§923.17,
903.12 (1), (2) AND 902.14, F. S.*To: Rodney B. Thursby, Sheriff, Deland*

QUESTIONS:

1. If a defendant posts a surety bond for appearance before a committing magistrate, and is bound over to the circuit court in the same amount of bond, can the surety bond posted as above, continue to serve as sufficient surety for defendant's appearance before the circuit court?

2. If the surety bond was written for appearance before the "county judge's court and/or circuit court, day to day and term to term as directed," would this surety bond serve to guarantee the appearance of the defendant before both the committing magistrate and the circuit court?

An appearance bond or bail bond is in itself a written contract by and between the principal and surety on one side and the sovereign power of the state on the other. There are standard forms in common use for appearance bonds in our state based on §923.17, F. S., which designate the general language to be used therein. It is the duty of the sheriffs of our respective counties to examine each bond presented, and he has the discretionary power to accept or refuse such bonds. Upon accepting any such bond the sheriff is bound by the wording thereof. Going specifically to question 1, if a bond is posted for the purpose of assuring appearance of principal before a committing magistrate, and thereafter the principal upon the date so directed, should appear before said magistrate, then the conditions of said bond have become satisfied and the bondsman is released of any further liability upon his undertaking. After having appeared before the committing magistrate should the principal be bound over to the circuit court or the ensuing grand jury, this action would impose upon the principal a separate and distinct obligation and would therefore necessitate an additional undertaking by the surety in the event said principal elected to remain free of incarceration pending such proceedings.

With reference to question 2, a bond worded in the exact language which you have presented, that is, "and/or" would become satisfied upon the appearance of the principal before either the county judge's court or the circuit court upon the date and time recited in said bond, and the appearance of the principal before either one of these tribunals would obviate the necessity of his appearance before the alternate tribunal insofar as the liability of his surety is concerned. Therefore, your question 2 is answered in the negative.

Even if a bond should be tendered to you which requires the defendant to appear before the county judge's court *and* the circuit court, I do not think that you should accept such a bond because the law contemplates that one bond be given for the defendant's appearance before the county judge, sitting as a committing magistrate, and that another bond be given to insure

the defendant's appearance before the circuit court in the event that the county judge should bind him over to answer the circuit court.

Section 903.12(1), F. S., prescribes the condition for "*the undertaking*" to be given for the appearance of the defendant for a preliminary examination. If the defendant is bound over to the circuit court, §903.12(2) specifies the conditions of "*the undertaking*" to be given by the defendant to answer the charge before the circuit court. As I see it, these statutory provisions contemplate that a separate bond shall be given in each instance, and there is good reason for so requiring. There is no occasion or predicate for a defendant, charged with felony before a committing magistrate, to make bond to answer a higher court before he is bound over to answer that court; he may be discharged at the preliminary hearing.

Moreover, §902.14, F. S., requires that he be admitted to bail if he is bound over and is bailable by the magistrate as a matter of right. Admitting a defendant to bail includes setting the amount of bail. So, the intent of §902.14 is that bail to answer a higher court shall not be set by the magistrate until the defendant is bound over to answer that court. Therefore, a bond to answer the higher court is not proper prior to such binding over.

Therefore, I think that your question 2, as framed, is properly answered in the negative and that you should not accept a bail bond for the appearance of a defendant before more than one court, however the bond might be worded.

057-299—September 18, 1957

CRIMES

VIOLATION OF LOTTERY LAWS

To: Robert R. Trench, Assistant State Attorney, Clearwater
QUESTION:

An oil company in promoting the opening of a service station wishes to use the following promotional scheme on opening day: Prior to opening, to mail to a known list, cards to be signed and deposited at the station on opening day, and to further have similar cards signed during opening day either by patrons or non-patron passers-by, all cards to be deposited in a box from which a number will be drawn and the holder of that number, who does not have to be in attendance, will receive a prize. Is the scheme in violation of our lottery laws?

Since you have indicated your familiarity with our past opinions on this subject, it is suggested that you review them in light of *Little River Theatre Corp. v. State ex rel. Hodge*, Fla., 185 So. 855.

Here, the consideration involved, as compared with the *Little River Theatre* case, *supra*, would be constituted by the physical efforts of the card signers or their respective agents in depositing their cards at the place of business.

In view of the above cited decision and the prior opinions of this office it is my opinion that the scheme such as you describe would, in itself, constitute a violation of our lottery laws as interpreted in the strictest sense.

057-300—September 18, 1957

CRIMES

POSSESSION OF FIREARMS—DASH-POCKET OF AUTOMOBILE—§790.05, F. S.

To: *H. V. Branch, Assistant Chief of Police, Jacksonville*
 QUESTION:

Is it a violation of the Florida Statutes for anyone to have within his automobile a pistol or other firearm while operating said automobile in the state?

Section 790.05, F. S., provides that it is unlawful for anyone to "carry around with him or have in his manual possession . . . any pistol or rifle without having a license from the county commissioner. . . ."

Our supreme court decided in *Watson v. Stone*, Fla., 4 So. 2d 700, that the above statute does not apply in the event that the firearm is carried in the dash-pocket of the automobile. This construction was enlarged upon in a 1951 opinion of the attorney general under number 051-722 in the following language:

Under this section the carrying of pistols or repeating rifles without permit is prohibited regardless of concealment, but a person who carries a pistol or repeating rifle in his automobile for protection while traveling does not violate the law against carrying weapons without a license.

Your question as rephrased above is therefore answered in the negative.

057-301—September 18, 1957

CRIMINAL PROCEDURE

BAIL BONDS AND RECOGNIZANCE—AUTHORITY OF HIGHWAY PATROL TROOPER TO DETERMINE AMOUNT AND APPLICABILITY; CONSTRUCTION OF §§321.05

(4) AND 320.56, F. S.—§§320.56, 322.23, 322.25
 AND CH. 317, F. S.; §8, D. R., STATE CONST.

To: *Charley E. Johns, State Senator, Starke*
 QUESTION:

After apprehending a traffic violator, may a highway patrol trooper legally determine, in his own discretion, the amount of bond required of such violator to guarantee his appearance in court on the traffic charge?

The courts have generally held that the power to admit to bail is a judicial power (*Ex parte Hyde*, 140 Fla. 494, 192 So. 159). However, statutes frequently provide for the allowance of bail by police officers in misdemeanor cases (see 6 Am. Jur., Bails and Recognizance, §23). Such is true in Florida as to traffic offenses.

Section 321.05(4), F. S., relating to the powers of highway troopers, where applicable, provides:

. . . In all cases of arrest by patrol officers the person arrested shall be delivered forthwith by said officer to the sheriff of the county or he shall obtain from such person arrested a recognizance or, if deemed necessary a cash

bond or other sufficient security conditioned for his appearance before the proper tribunal of such county to answer the charge for which he has been arrested. . . . All patrol officers are hereby directed to deliver all bonds accepted and approved by them to the sheriff of the county, in which the offense is alleged to have been committed; . . ." (Emphasis supplied).

It is apparent from the foregoing quoted language that a highway patrol trooper is not only vested with authority to determine the amount of bail bond required, but he may also release the person on his own recognizance.

Section 320.56, F. S., also relating to appearance bonds for traffic offenses, provides as follows:

It is unlawful for any officer in the discharge of his duties, as provided in this chapter or Ch. 317, to demand an excessive appearance bond, and in all such cases the gravity of the offense committed shall be considered in the requirement of such appearance bonds.

The language of the foregoing section also strongly implies authority in a traffic law enforcement officer to use his discretion in the determination of the proper amount of an appearance bond. However, the legislature apparently considered it essential to place a strict limitation on the employment of such discretion when it stated that "in all such cases the gravity of the offense committed shall be considered in the requirement of such appearance bond." To some extent this limitation recognizes the constitutional direction that "excessive bail shall not be required" (§8, D. R., Fla. Const.; Amendment VIII, U. S. Const.).

In the exercise of such discretion, a highway patrol trooper should not determine the proper appearance guarantee solely by reference to the penalties imposed by the county judge on previous traffic offenders in the area. Such determination should consider, among other things, the probabilities of the violator's appearance before court on the charge, the authority and practicability of a *capias* being issued upon default, and, if an out-of-state driver, the authority of the department of public safety to suspend the nonresident's privilege, and to report such to the "motor vehicle administrator in the state" wherein the person is a resident, as contemplated by §322.23, F. S.

I believe also that the necessary incentive to appear on the traffic charge is furnished, in most cases, whenever the offending motorist is made aware that a *capias* can or will be issued for his arrest for a bond estreature or failure to comply with a recognizance, and that in some instances a driver's license may be suspended through an estreature (see §322.25(3), F. S.).

Your question is answered in the affirmative.

057-302—September 19, 1957

TAXATION

HOSPITALS AND HOSPITAL DISTRICTS—HOMESTEAD TAX EXEMPTIONS, ETC.—§7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are homesteads in this state subject to the taxes

and assessments levied for the support of a hospital district and the hospital?

In *Crowder v. Phillips*, 146 Fla. 428, 1 So. 2d 629, text 630, the court remarked "that a hospital is a distinct advantage to the entire community because of its availability to any person who may be injured or stricken with disease cannot be gainsaid, but there is no logical relationship between the construction and maintenance of a hospital, important as it is, and the improvement of real estate situated in the district. The purpose is, of course, to provide a place where those who are so unfortunate as to be injured or to become diseased may receive the benefits of medical skill and modern apparatuses whether they be the owners of property or not, and such advantages cannot fall in the category of special benefits to real property for which assessments would be authorized."

The only taxes or assessments that may be levied and assessed against homesteads in this state are "assessments for special benefits" (§7, Art. X, State Const.). In the light of the *Crowder v. Phillips* case, supra, the taxes and assessments for the construction and maintenance of a hospital not being "assessments for special benefits," it appears that the above question should be answered in the negative.

057-303—September 20, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
REDISTRICTING COUNTY COMMISSIONERS DISTRICTS,
JURISDICTION OF JUSTICE OF PEACE—EFFECT OF
SPECIAL CENSUS—§5, ART. VII AND §5, ART.
VIII, STATE CONST.**

To: *William D. Barrow, County Attorney, Crestview*

QUESTIONS:

1. Is Ch. 57-126, a bar to the redistricting of county commissioners districts in Okaloosa county, based on the 1956 special census of said county?

2. Does the Okaloosa county special census of 1956 have any application to the jurisdiction of Okaloosa county justices of the peace in the light of Ch. 57-126?

Section 5, Art. VIII, State Const., requires that the boards of county commissioners of the several counties "from time to time fix the boundaries of" the county commissioners districts of the county, which districts "shall be as nearly as possible equal in proportion to population." Section 5, Art. VII, State Const., was amended in 1950 so as to abolish the state regular censuses theretofore taken, adopting the 1950 federal and subsequent decennial censuses as the state census which census "shall control in all population acts and constitutional apportionments, unless otherwise ordered by the legislature."

Section 2, Ch. 57-126, provides that "no special or district census shall be effective for any purpose other than to ascertain the population for the purposes of interpreting law relating to additional judges of the circuit court . . ." In the case of *Singleton v. State*, Fla., 69 So. 2d 794, text 799, there is indication by the court that the county commissioners were not bound to use the decennial state or federal census.

It is our opinion that the county commissioners are not prohibited from taking into consideration a special population census in fixing the district boundaries. Any reliable evidence having logical relevance to a proper determination of the boundaries within the intent of the constitution can be considered by the county commission.

It is not believed the intent of the legislature in Ch. 57-126 was to preclude such consideration. What was intended by Ch. 57-126 was that a special census would not automatically operate to change the effect of laws other than those providing for additional circuit judges which laws have application only in terms of fixed population brackets, levels or categories. It did not relate to a situation where latitude and discretion are to be exercised administratively by officials.

Nor do we consider that the fixing of the boundaries is a constitutional apportionment in the sense prescribed by §5, Art. VII. Constitutional apportionments have reference to those referred to in Art. VII. It should be noted in this connection that the duty of the county commissioners is involved with the population spread in the various areas of the county and the allocation of it as nearly equal as possible within the five districts. Population acts as such and constitutional reapportionments on the other hand are concerned with the total population of a particular county or counties as compared to the total population of another county or counties.

In determining the question of boundaries the commissioners would have sound administrative grounds to consider any reliable source of evidence. They could themselves check the current population condition in the various sections of the county and take into account population increases and shifts district-wise since the last federal census.

The answer to the 1st question is in the negative.

As to question 2, Ch. 57-126 authorizing a special census to ascertain the population for the purpose of interpreting an existing law relating to additional judges of the circuit court appears to be the only exception to §5, Art. VII. Therefore, the jurisdiction of the justices of the peace cannot be extended or expanded by special census.

Question 2 is answered in the negative.

057-305—September 23, 1957

TAXATION

AD VALOREM TAX ASSESSMENTS—LANDS USED FOR AGRICULTURAL PURPOSES—§§193.11(3), 193.06 AND 193.13, F. S.; §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What, if any, is the effect of Ch. 57-195, amending §193.11, F. S., by adding a subsection (3) thereto, upon the valuation and assessment of lands being used for agricultural purposes?

Subsection (3) of §193.11, F. S., as added by said Ch. 57-195, provides that "all lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis,

regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development." "Agricultural purposes," as used in the said subsection includes "only lands being used in a bona fide farming, pasture or grove operation by the lessee or owner, or some person in their employ." There are other limitations in the said subsection which are not directly here involved.

"It is generally conceded that the law requires and demands of all taxing officials the duty and responsibility of exercising good faith and sound judgment in arriving at valuations of all property for tax purposes so that equality and uniformity in valuations shall at all times prevail" (Sanders v. Crapps, Fla., 45 So. 2d 484, text 487). "'A just valuation of all property' is not secured, as is mandatorily required by the constitution (§1, Art. IX, State Const.), when the assessment valuation of some property is higher proportionately than the valuation put upon other property assessed for the same purpose" (Sparkman v. Bank of Ybor City, 71 Fla. 210, 71 So. 34, text 38; to the same effect see also Colonial Investment Co. v. Nolan, 100 Fla. 1349, 131 So. 178, text 182). "Valuations for taxation must have a just relation to the real and known value of the property assessed, and not to some unknown and speculative value, and there must be no substantial inequality in valuations in the various kinds and items of property that is subject to tax" (Camp Phosphate Company v. Allen, 77 Fla. 341, 81 So. 503, text 510).

The statutes of this state (§§193.06, 193.11, 193.13, F. S.) require that all taxable property in this state be assessed "at its full cash value," or at its true value. It was held in Cosen Investment Co., Inc. v. Overstreet, Fla., 17 So. 2d 788, that real property must be assessed at its full cash value to avoid inequality in taxation between homestead owners and nonhomestead owners. This being true, although "all lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat or subdivision or other real estate development," the requirement that they be assessed at their full cash value has not been altered. When assessing such lands for purposes of taxation the assessor should treat and consider lands within the purview of said Ch. 57-195, or §193.11(3), F. S., as agricultural lands, and assess them upon the same basis of valuation to full cash value as other taxable real property is assessed. The full cash value of such lands is a question of fact to be determined by the tax assessor.

These observations answer the above stated question as well as the same may be answered from the facts and circumstances before us.

057-306—September 23, 1957

TAXATION

CIGARETTE TAXES, CH. 210, F. S.—§11, ART. VIII, DADE COUNTY HOME RULE CHARTER, §4, ART. IX, STATE CONST.; §1.01(d) DADE COUNTY CHARTER

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should the state comptroller, in the light of §11,

Art. VIII, State Const., and subsection "D" of §1.01, of the Dade county charter, pay over to the board of county commissioners for Dade county, the cigarette taxes collected in Dade county outside of existing municipalities?

Subsection "D" of §1.01, of the Dade county charter, adopted pursuant to §11, Art. VIII, State Const., provides that "the board shall be entitled to levy in the unincorporated areas all taxes authorized to be levied by municipalities and to receive from the state any revenues collected in the unincorporated areas on the same basis as municipalities." This provision seems to extend to cigarette taxes. Under paragraph (b), subsection (1), §11, Art. VIII, State Const., the board of county commissioners for Dade county may be authorized "to levy and collect such taxes as may be authorized by general law and no other taxes, and to do everything necessary to carry on a central metropolitan government in Dade county." Subsection (4) of said §11, Art. VIII, State Const., seems to relate to revenues usually payable to counties and to cities by the state, and would not relate to taxes, such as the levy of cigarette taxes by a county outside of municipal corporations, not specifically provided by general law.

Section 210.03, F. S., authorizes the levy and assessment of cigarette taxes by municipalities. Such taxes levied by a municipality may be credited against the state tax (§210.02, F. S.). There is no like or similar provision in the statutes providing for the levy of a county cigarette tax, or providing a credit of any county tax against the state tax as is provided by said §210.02 for municipal cigarette taxes. Section 210.02, F. S., makes an appropriation from the state treasury to the municipalities of municipal cigarette taxes collected by the state for the said municipalities. We find no like or similar appropriation of cigarette taxes to the counties even though they may be given authority to levy and collect cigarette taxes. We find nothing in the statutes of this state appropriating cigarette taxes to counties except in counties where there are no incorporated municipalities as provided in §210.20(2)(b), F. S. Cigarette taxes, both the state tax and the municipal tax, are collected and paid into the state treasury to be distributed according to the appropriations of said §210.20, F. S.

Section 4, Art IX, State Const., provides that "no money shall be drawn from the Treasury except in pursuance of *appropriations made by law*." (Emphasis supplied.) In an Advisory Opinion, 43 Fla. 305, 31 So. 348, text, the justices of the supreme court, after citing several constitutional provisions, including said §4 of Art. IX, remarked that it will be observed from the sections of the state constitution referred to "and others therein that money can be appropriated by the legislature only by means of a bill by it enacted into law with the formalities prescribed by the constitution for enacting bills into law as distinguished from resolutions." In this same connection see Advisory Opinion reported in 156 Fla. 48, 22 So. 2d 308, text 400. A draft of money from the state treasury is expressly prohibited unless in pursuance of an appropriation made by law. We find nothing in §11, Art. VIII, State Const., or other constitutional provision, changing this requirement. We find no statute or law enacted by the legislature which may be construed as an appropriation of moneys from

the state treasury in accordance with subsection "D" of §1.01 of the Dade county charter.

Being in grave doubt as to the authority of Dade county, under §11, Art. VIII, State Const., or any other constitutional provision, and of the right of the state comptroller to draw a warrant for the funds claimed, without regard to the right of the said county to levy a cigarette tax, without an express legislative appropriation, the above question is answered in the negative unless and until directed to do so by some court of competent jurisdiction.

057-308—September 24, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

HOTEL AND RESTAURANT COMMISSION CH. 509, F. S.,

BLACKSTONE HOTEL, CLASSIFICATION—

§509.241(1)(c)1., 3., F. S.

To: Robert Kloeppel, Jr., State Hotel Commissioner, Tallahassee
QUESTION:

Is the Blackstone hotel on Miami Beach being currently operated by the Sossin foundation, subject to the requirements of Ch. 509, F. S.?

You have attached to your inquiry a letter from Michael Sossin, executive director, as well as the retirement plan of the Sossin foundation for Geriatric research. The facts set forth in the Blackstone hotel letter to the hotel commission, dated July 12, 1957, are extremely limited as to the details of the operation of the Blackstone hotel. They are as follows:

The Blackstone dedicates itself to the enriched living of the aged; and to the true, sound and sympathetic principles of geriatrics and gerontology. It is a non-denominational and non-profit home to offer aged persons all the elements of security, serenity, comfort, psychological counseling, physical medical care, recreation, and proper nutrition.

A second objective of the Foundation is to establish, for unbroken continuity, convalescent homes for their declining or infirm period. These also are based on a non-sectarian and non-profit plan, and similarly for the permanent rather than the transient resident.

The mere fact that boarding or lodging accommodations are furnished at an institution, which is operated primarily for another purpose, does not constitute it as an inn or hotel and a hotel may be distinguished from a boarding, lodging, or rooming house. The principal distinction is that in the case of houses of the latter class, the proprietor deals with his customers individually with respect to terms and accommodations and exercises the right to reject any or all applicants at his pleasure, while in the case of inns and hotels, the proprietor deals with the public generally on the basis of an implied contract and may not arbitrarily refuse to receive as a guest one who is entitled to be so received. A boarding house has also been said to differ from an inn or hotel both as to being less public in character and in arranging with its patrons to provide for them during some more or less definite period (28 Am. Jur., Innkeepers, 4, 8).

In consideration of your problem, your attention is also directed to the distinction between a guest and a boarder. A guest is a transient who receives accommodations at an inn; his transient character being the essential distinguishing feature between him and a boarder or lodger (43 C. J. S., Innkeepers, 3).

A person enjoying accommodations under such conditions of permanency as to make the place his home or residence for the time-being is not a guest but a boarder.

A study of the file submitted with your request, while presenting extremely limited facts, does indicate the operation of the establishment known as the Blackstone hotel by the Sossin foundation for Geriatric research, might well be other than the normal hotel operation. This is borne out by the definition of a hotel as found in §509.241(1)(c) 1., F. S., which, among other things, defines a hotel as "... providing the services generally provided by a hotel. . . ." The resume of the purposes of the Sossin foundation indicates that the persons enjoying the facilities of the establishment will participate where practical in the operation of the establishment and there will also be a registered nurse on the premises, as well as a weekly medical clinic available to them, family type meals will be provided with particular attention paid to those persons requiring special diets. This aspect of the operation clearly indicates something other than the normal hotel type of operation of this establishment is being undertaken.

Your attention is also directed to §509.241(1)(b) 3., which provides an exemption from the provisions of this section to all hospitals, nursing homes and other similar places.

It is my opinion on the facts presented that the establishment known as the Blackstone hotel on Miami Beach, operated by the Sossin foundation, comes under the jurisdiction and regulation of the Florida hotel and restaurant commission, not as a hotel but as a rooming house, and upon proper showing of facts, said establishment may well be within the exemption provisions hereinabove set forth.

057-309—September 25, 1957

PUBLIC BUSINESS

STATE PURCHASING COMMISSION—BIDS, PURCHASES EXCEEDING \$1,000, §287.081, AS AMENDED BY CH. 57-171, §287.011, F. S.

To: *State Auditing Department, Tallahassee*

QUESTION:

May a contract, in excess of \$1000, be awarded for the services of an interior decorator to advise with a state agency concerning interior decorations and draperies for such agency and to select material for, manufacture and install such decorations and draperies, etc., in the light of present §287.081, and former §287.08, F. S.?

Chapter 287, F. S., prior to and since its amendment by Ch. 57-171, required and now requires that purchases of commodities, where the purchase price thereof is in excess of \$1,000, be made upon competitive bids received, with certain exceptions not here material. The term "commodities," as used in said Ch. 287, means

and includes "the various commodities, goods, merchandise, equipment and other personal property purchased by the agencies of the state." (§287.01 (former) and §287.011 (present), F. S.). Although the decorations and drapes as such may be goods, commodities, merchandise or equipment, in the furnishing them by an interior decorator, there is also involved technical services in studying and determining the material to be used, the selection of the proper color and shade, the selection of the type and kind of decorations and drapes to be used, and the preparation of the decorations and their installation. We are not here dealing with commodities, goods, merchandise, equipment and other personal property alone, but with technical and professional services, also equipment and materials prepared and furnished through such technical and professional services.

It has been held that the employment of accountants, attorneys, architects, engineers, surveyors, building inspectors, artists and the like are not usually held to be within statutes such as §§287.08 and 287.081, F. S., above mentioned (Anno. in 11 A. L. R. 1150 and 142 A. L. R. 542). *McKenzie v. State*, 76 Oh. St. 369, 81 N. E. 638, involved the employment of an interior decorator to decorate the inside of a large public building, furnishing all materials. Such employment was held not within a statute similar to said §§287.08 and 287.081. The same rule was applied to a landscape architect employed to landscape a public educational building, furnishing all plants, etc., and other materials necessary, in *Louisiana v. McIlhenny*, 201 La. 78, 9 So. 2d 467.

The above question is, therefore, answered in the affirmative.

057-310—September 25, 1957

CRIMES

VIOLATION OF STATE LOTTERY LAWS—MIAMI HERALD CONTEST

To: *Arthur E. Huttoe, Assistant State Attorney, Miami*
QUESTION:

Does the football game winner guessing contest conducted by Miami Herald constitute a violation of lottery laws?

On Feb. 1, 1952, in opinion 052-33, this office ruled on the identical question as constituting a lottery.

As you know, a lottery contains three elements, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

That a prize was to be awarded by this scheme is apparent. Even though some judgment and skill are involved in forecasting the results of the football games specified in said advertisement, I think that chance predominates over skill, and that the contest is essentially a guessing contest. Where chance predominates over skill, the element of chance which is essential to a lottery is present (34 Am. Jur., 649-650. Lotteries, §6; 54 C. J. S. 846-847, Lotteries, §2b(2)). *And guessing contests are generally held to be lotteries.* (54 C. J. S. 857, Lotteries, §10b; 34 Am. Jur., 655-656, Lotteries, §12. Therefore, it is my opinion that the said contest contained the requisite element of chance, just as much so, as far as the law is concerned, as if the winner were determined by drawing numbers from a hat.

The element of consideration in the scheme outlined is apparent when compared with the reasoning of the Florida supreme court in the case of *Little River Theatre Corp. v. State, Fla.*, 185 So. 855.

It is therefore my opinion that the scheme outlined, if actually put into operation, would constitute a violation of the lottery laws of the state.

057-311—September 26, 1957

HIGHWAYS, BRIDGES AND FERRIES

COUNTY ROAD SYSTEM—RESUBDIVISIONS OF SUBDIVISIONS—EFFECT ON ROADS AND STREETS

THEREIN—§336.09, CH. 177, §§177.06, 177.10

AND 177.14, F. S.

To: *John M. Hathaway, Punta Gorda*

QUESTION:

Where an existing subdivision is resubdivided and replatted, may the roads and streets indicated on the previous subdivision maps and plats be abandoned or changed without complying with §§336.09, et seq., F. S., or other like authority?

Chapter 177, F. S., provided for the preparation, approval and recording of maps and plats of lands into lots and blocks or other subdivisions. There is required, in connection with the preparation and adoption of such plats and maps, that the plat shall be dedicated by the owners in the manner provided in §177.06, F. S. This dedication would seem to amount to an offer to the public to dedicate the roads, streets and highways indicated on the plat or map, and probably, also the parks, to public use. Although such maps or plats, before recording, must be approved by either the board of county commissioners or the municipality having jurisdiction over the platted lands, such approval does not bind "the county commissioners, town board, city council or board of commissioners to open up and keep in repair any parcels dedicated to the public in any map or plat so offered, but they may exercise such right at any time" (§177.10, F. S.).

"Whenever any road constructed by any of the several counties or incorporated municipalities, or by the department (state road department), shall have been maintained, kept in repair or worked continuously and uninterruptedly for a period of four years, by any county, municipality or by the department, either separately or jointly, such road shall be deemed to be dedicated to the public" (§337.31, F. S.). In *Board of County Commissioners v. F. A. Sebring Realty Co., Fla.*, 63 So. 2d 256, text 257-8, it was held that the approval of a plat by a board of county commissioners or a municipality, under Ch. 177, F. S., does not amount to an acceptance of the dedication made by the owner by offering the said plat or map for record. It was further held in this case that the said statute was not "intended to change the established law in this jurisdiction that there must be a showing of a formal acceptance of an offer to dedicate land for public use or an acceptance by public user before it can be said that the lands so offered for dedication have been actually accepted." In this connection see also *Brooks-Garrison Hotel Corp. v. Sara Inv. Co., Fla.*, 61 So. 2d 913; *Town of Crystal River v. Williams, Fla.*,

61 So. 2d 382; *Mumaw v. Roberson*, Fla., 60 So. 2d 741, and other Florida cases.

Section 177.14, F. S., relating to the vacation and annulment of former subdivision plats and maps, in which no lots or parcels were sold by the subdivider, after resubdivision plats or maps have been approved and filed and lots or parcels of land have been sold under the resubdivision plat or map, seems to apply in those cases where there has been no public acceptance of the dedication in the former subdivision, either by user or by the action of public authorities, or maybe in cases where there has clearly been an abandonment by the public after acceptance.

Although the right of the public to use a dedicated road or highway may be lost by abandonment (39 C. J. S. 1065, §130) there is considerable authority to the effect that nonuser alone, unconnected with other evidences of abandonment, will not prove abandonment (39 C. J. S. 1066, §131). In some cases the nonuser of a highway for the period of adverse possession under the statutes has been taken into consideration (39 C. J. S. 1067, §131, notes 40 et seq.); however, in this state there would appear uncertainties as to the period of adverse possession against public bodies and agencies, if such statutes there be.

These authorities lead us to suggest that in cases not clearly within the purview of §177.14, F. S., where there has been some user, or a formal public acceptance of the offer to dedicate, that §§336.09, et seq., F. S., be complied with before the resubdivision plat be approved for record.

This seems to answer the above question in the affirmative, as to and only as to those plats and maps clearly within the purview of §177.14, F. S., and in the negative as to other plats and maps offered for approval and record.

057-312—September 27, 1957

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

SALE OF LIQUID FUELS—CONSTRUCTION OF CH.

57-826 (§526.111, F. S.)

To: *Florida Sheriffs Association, Tallahassee*

QUESTION:

Are signs, placards or other means of gasoline advertisements bearing notations such as "Discount to Trucks," "Cut Rates," "Lowest Prices in Town," "Gas—2¢ Less," "Gasoline Price War," and similar expressions within the purview of Ch. 57-826, acts of 1957?

Chapter 57-826 makes it unlawful "for any person, firm or corporation to display, or allow to be displayed *on his premises*, any sign, placard or other advertisement *relating to the retail price of gasoline* unless the numerals thereon indicating fractions or portions of a whole number *are at least half the size of the largest whole number on such sign*, and no such price of gasoline shall be advertised *without the tax included*. No such person, firm or corporation shall be required to post prices pursuant to this act. No such sign, placard or other advertisement, *except the price posted on the pump*, shall be displayed *within fifteen feet of the right-of-way of any public street, road or highway*." (Emphasis supplied.)

Section two of the act provides a fine and imprisonment for

violations of the said act. The statute is therefore a penal one. Penal laws are strictly construed, and if there is any doubt as to their meaning such doubt should be resolved in favor of the citizen or accused (*Watson v. Stone*, 148 Fla. 516, 4 So. 2d 700, text 701; *Lollie v. General American Tank Storage Terminals*, 160 Fla. 208, 34 So. 2d 306, text 308; *Florida Industrial Commission v. Manpower, Inc.*, Fla., 91 So. 2d 197, text 199). These rules must be kept in mind when construing the above mentioned statute.

The subject matter of the statute appears to be signs, placards and other advertisements relating to the price of gasoline. No such signs, placards or other advertisements may be displayed upon the premises where the gasoline is sold unless the fractions of cents used on such signs, placards and advertisements are stated in letters or figures at least half the size of letters and figures used in stating the said price, and unless the advertised price includes the gasoline taxes, that is, state and federal taxes and local taxes, if any. The statutes regulate signs, placards and other advertisements relating to the price of gasoline, not merely those stating the price of gasoline.

Signs, placards and advertisements, relating to the sale of gasoline and gasoline prices appear to be within the act whether the price be specifically stated or not. Signs, placards and advertisements relating to the sale of gasoline advising cut rates in the price of gasoline, discounts in the price of gasoline to trucks, "Lowest Prices in Town," "Gas—2¢ Less," "Gasoline Price War," and similar advertisements seem to be advertisements relating to the retail price of gasoline. An advertisement of the sale of "Gas—2¢ Less" reveals the price of gasoline only when compared with other gasoline prices, but is nonetheless an advertisement relating to the retail price of gasoline.

In the light of the above observations, we feel that the above stated question should be answered in the affirmative.

057-313—September 30, 1957

**COUNTY ORGANIZATION, OFFICERS, REGULATIONS
AUTHORITY OF COUNTY TO ACQUIRE AND FURNISH
RIGHTS-OF-WAY, SPOIL AREAS, ETC., FOR PUBLIC
WATERWAY, ETC., §5, ART. VIII, STATE CONST.;
§125.01(5), F. S.**

To: Board of County Commissioners, Cross City
QUESTION:

May a board of county commissioners use county funds to acquire and furnish necessary lands, easements, rights-of-way and spoil areas for the construction, by the U. S., of a navigable channel or canal, from public navigable waters, to an area in the county, with necessary turning basins, mooring facilities, etc., so as to provide facilities for water transportation to and from the county?

It was held in *Board of County Com'rs v. Board of Pilot Com'rs*, 52 Fla. 197, 42 So. 697, text 702, that "a river, harbor, or bay of a port is a public highway, useful to the people of the county in which it is situated for the purposes of navigation and commerce. The depth of the water therein is one of the chief elements of its value, and its protection from injury of being filled in is within the purposes for which county governments are estab-

lished, even though the harbor or bay be also and largely used for passage to and from, and commerce with, points beyond the county. It is competent for the state, acting through the counties, to protect the ports, harbors, bays, and rivers therein, if the control of the general government within its sphere is not thereby interfered with. See *Cotton v. County Com'rs of Leon County*, 6 Fla. 610; *Stockton v. Powell*, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; *County Com'rs of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416; *Skinner v. Henderson*, 26 Fla. 121, 7 So. 464, 8 L. R. A. 55; *President and Com'rs, etc. v. State ex rel Board, etc.*, 45 Ala. 399."

Stockton v. Powell, 29 Fla. 1, 10 So. 688, involved an act of the legislature authorizing the board of county commissioners to make certain improvements in the St. Johns river for the benefit of navigation and to issue bonds to raise funds for the making of such improvements. This was held to be for a county purpose and valid. It was held in *Macrum v. Hawkins*, 261 N. Y. 193, 184 N. E. 817, that a county may use county funds for the dredging of harbors, inlets and waters.

It is evident from the above and foregoing authorities that although "a river, harbor or bay of a port is a public highway, useful to the people of the county in which it is situated" (*Board of Com'rs v. Board of Pilot Com'rs*, supra) which may be improved by the use of county funds (*Stockton v. Powell*, supra), under the provisions of §5, Art. VIII, State Constitution, prior to the 1944 amendment thereof, it was provided that the *powers, duties and compensation of the board of county commissioners shall be prescribed by law*. The court, in *Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638, text 642; *State v. Culbreath*, 128 Fla. 210, 174 So. 422, text 423; *Stubbs v. Florida State Finance Co.*, 118 Fla. 450, 159 So. 527, text 528; *Thursby v. Stewart*, 103 Fla. 990, 138 So. 742, text 750; *Stephens v. Futch*, 73 Fla. 708, 74 So. 805, text 806; and *Hopkins v. Special Road and Bridge District*, 73 Fla. 247, 74 So. 310, text 311, basing its holding upon said §5, Art. VIII, held that boards of county commissioners "have no power other than those expressly vested in them by statute, or that must be necessarily implied to carry into effect the powers thus expressly vested," and in *White v. Crandon*, 116 Fla. 162, 156 So. 303, text 305, and *Hopkins v. Special Road and Bridge District*, supra, further held that where there is doubt as to the existence of such authority it should not be assumed. However, it must be noted that when said §5, Art. VIII, State Const., was amended in 1944, all reference to the powers of the county commissioners, other than the power and duty to fix the boundaries of commissioners' districts, was omitted from the said section as amended. Although *Crandon v. Hazlett*, supra, involved a 1945 enactment and was decided in 1926, no mention of the change in the section was recognized by the court; as a matter of fact the court quoted from the section prior to amendment.

In the absence of statute or constitutional limitations a county board is clothed with authority to do whatever the county might do if capable of rational action (11 Cyc. 388-9, note 47; 15 C. J. 456, §102). In the absence of constitutional limitations the legislature may limit, enlarge or curtail the powers of a board of county commissioners (20 C. J. S. 849-853, §82). We must therefore conclude that notwithstanding the change made in §5, Art. VIII, State Const., by the 1944 amendment, the powers and duties

of county commissioners remain statutory. We must, therefore, look to the statutes for the authority of the county board in connection with the above question.

Under §125.01(5), F. S., boards of county commissioners may "alter, lay out, maintain, establish, vacate and discontinue any road or *highway* in their respective counties." In *Board of Com'rs v. Board of Pilot Com'rs*, 52 Fla. 197, 42 So. 697, text 702, the court remarked that "a river, harbor or bay of a port is a *public highway* useful to the people of the county in which it is situated for the purpose of navigation and commerce. (Emphasis supplied.) This rule appears to have been applied in other states (*Strange v. Board of Com'rs*, 173 Ind. 640, 91 N. E. 243, text 247; *Hayward v. Chisolm*, 11 Rich Law (S. C.) 253, text 356; *City of Long Beach v. Payne*, 3 Cal. 2d 184, 44 P. 2d 205, text 307; *Murphy v. Inter-Ocean Cas. Co.*, 98 Ind. App. 668, 186 N. E. 902, text 904; *Keen v. Stetson*, 22 Mass. 492, text 495; *Lehigh Valley Railroad Co. v. Dover Railroad Co.*, 43 N. J. L. 528, text 531; *Mashburn v. St. Joe Improvement Co.*, 19 Idaho 30, 113 P. 92, text 94; *Re. Burns*, 16 App. Div. 507, 44 N. Y. S. 930, text 934; *Barnett v. Johnson*, 15 N. J. E. 481, text 485; *Shannon v. Martin*, 164 Ga. 872, 139 S. E. 671, text 672).

This brings us to the question of whether the term "highway" used in §125.01(5), may be construed as embracing waterways as highways. Said subsection (5) is identical with a like subsection in §578, R. S., 1892, and appears to have originated as a part of §1, Ch. 3039, 1877. Although this statutory provision dates back to the time when waterways were used more extensively than now for travel and commercial purposes we find nothing indicating to us that waterways have ever been generally considered as "highways" within the purview of said §125.01(5), F. S., by boards of county commissioners generally.

These statutes, authorities and observations lead to a negative answer to the above stated question. Whether or not the same thing may or could be accomplished in connection with mosquito control (Chs. 388, 389 and 390, F. S.), playgrounds and recreation centers (Ch. 418, F. S.), or through the Florida development commission (Ch. 288, F. S.), might be investigated.

057-314—October 1, 1957

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—DRIVERS' LICENSES—MANDATORY REVOCATION, CONSTRUCTION OF §§317.20 AND 322.26, F. S.

To: T. M. King, Jr., Department of Public Safety, Tallahassee
QUESTION:

Is it mandatory that the driver's license of a person be revoked when he is convicted of being in actual physical control of a motor vehicle while under the influence of intoxicants?

Section 322.26, F. S., enumerates offenses the conviction of which requires the department to mandatorily revoke a driver's license. Among the offenses enumerated is:

(2) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug.

The foregoing quoted language does not describe an offense but merely refers to one. The mere use of intoxicants or narcotic drugs by a motor vehicle operator is not per se unlawful. The use or influence must be to such a degree that the driver is no longer capable of safely operating a motor vehicle. This conclusion is reached by reference elsewhere in the statutes for understanding of the intent of the legislature when it used the above quoted language.

When searching elsewhere in the statutes, substantially similar language as that quoted above is found in the heading or title of §317.20, F. S., and reads as follows:

Driving while under the influence of intoxicating liquor or narcotic drugs.

The language in this heading or title was provided by the legislature in the original act creating §317.20, (Ch. 20578, 1941). The entire section therefore contains the meaning that the legislature intended when it used the language in §322.26(2): "driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug."

Reference to the body of §317.20 discloses two offenses: the offense of "driving while under the influence of intoxicating liquor or narcotic drug, when affected to the extent that his or her normal faculties are impaired," and the offense of "being in the actual physical control of any vehicle" while in such physical condition. The same penalty is prescribed for both offenses.

If the heading or title of §317.20 had been provided by the statutory reviser, its sole function would have been to act as an index. However, since it was furnished by the legislature, its consideration is proper when determining the intent of the legislature (see *Berger v. Jackson*, 23 So. 2d 268; *Sutherland Statutory Construction*, §4903).

The two offenses described in §317.20 are so similar or related that it can be said, with little fear of contradiction, that one presumes the other. When considering the pronounced intent of the legislature to further safe driving on the highway, through control over driver licensing, it is difficult to believe that, as to the two offenses, the legislature intended the conviction of one to be grounds for the revocation of the privilege to drive, and a conviction of the other offense to have no effect whatsoever on the offender's franchise to operate a motor vehicle on the public highways.

In light of the above, it is apparent that the legislature intended the language in §322.26(2) to be in a sense *descriptio personae*, since it is essential to a conviction of such offense that there be a showing that the degree or influence of intoxicating liquor or narcotic drug absorption be to the extent that normal faculties are impaired. Since reference elsewhere in the statutes is necessary for the meaning of such language, and such reference discloses two offenses, it is my opinion that the legislature intended that §322.26(2) refer to and include both offenses set forth in §317.20 as grounds for the mandatory revocation of a driver's license.

The above reasoning and conclusion is not altogether original nor is it novel. Substantially similar reasoning and the same conclusion were reached by Judge Otis L. Farrington of the circuit

court of the 15th judicial circuit in *Prusz v. City of Ft. Lauderdale*, case 8609, when he affirmed the decision of the municipal court for the city of Fort Lauderdale revoking a driver's license upon conviction of the charge of being in the actual physical control of a motor vehicle.

Appellant's petition for certiorari in this case was denied by the supreme court on Aug. 23, 1955. However, since the petition was brought late, the denial of certiorari is presumed to have been predicated upon such fact and not on the merits. I am of the opinion, however, that the merits of such case would have prompted the same conclusion.

Your question is answered in the affirmative.

057-315—October 3, 1957

MOTOR VEHICLES

TITLE CERTIFICATES—NOTICE OF LIEN, EFFECT OF RECORDING AFTER APPLICATION FOR TITLE IS MADE
—CONSTRUCTION OF §§319.24(2) AND 319.27

(3) (b) (c), F. S.

To: Charles Knott, Motor Vehicle Commission, Tallahassee
QUESTION:

When an application is received by the motor vehicle commissioner for issuance of an original motor vehicle certificate of title, which states that no liens exist upon such vehicle, and subsequent to receipt of such application, but prior to issuance of the certificate of title, notice of lien upon said motor vehicle is received by the commissioner for recording, under §319.27(3), F. S., what is the duty of the commissioner in regard to noting the said lien upon the certificate of title?

Section 319.24(2), F. S., relating generally to the issuance of title certificates by the motor vehicle commissioner, where applicable to the question herein, provides as follows:

The commissioner or his duly authorized deputy shall sign the original certificate of title and all corrected certificates, and, if there are no liens or encumbrances on said motor vehicle *as shown in his records or as shown in the application*, shall deliver such certificate to the applicant, or as directed by the applicant in the application. If there are one or more liens or encumbrances on said motor vehicle, said certificate and a form in duplicate describing the identical vehicle, to be subsequently used by the lien holder as a satisfaction, shall be delivered or mailed to the holder of the first lien *as shown by the records in the office of the commissioner* as soon as possible . . . (Emphasis supplied.)

From the above language, and particularly the italicized portion, it is manifest that the commissioner has a duty, when requested to issue a certificate of title, to note any liens which have been recorded with the commission.

Applicable specifically to the question presented herein are the provisions of §319.27(3) (b) (c), which relate to the right of an out-of-state lien holder to have his lien noted on a Florida title

certificate issued on the encumbered vehicle. Such provision reads as follows:

(b) Any person, firm or corporation holding a lien for purchase money or as security for a debt in the form of a chattel mortgage, trust receipt, conditional sales contract or similar instrument covering a motor vehicle *upon which no certificate of title has been issued in this state*, may use the facilities of the office of the motor vehicle commissioner for the recording of such lien as constructive notice of such lien to creditors and purchasers of said motor vehicle in Florida. . . .

(c) When a Florida certificate of title is first issued on such vehicle the lien information shall be noted on the Florida certificate of title as is now provided for the noting of liens on motor vehicles registered and titled in Florida. (Emphasis supplied.)

It is apparent from the language of the above-quoted provision that, whenever a lien is recorded in the office of the motor vehicle commissioner prior to the *issuance* of a Florida certificate of title on the encumbered chattel, the commissioner is required to note such lien in the same manner as liens are noted on Florida registered motor vehicles.

The law as it is written compels the above view. Equity prompts a like conclusion, for is it not equally important that a subsequent innocent purchaser be aware of the existing encumbrances? However, the belated recording of a lien, although within the legally prescribed time to require its notation on the certificate of title, should nevertheless be recognized as a late recording.

This recognition could be accomplished by noting on the certificate of title or on an attached form the exact time that a lien was recorded with the commissioner and the exact time that the commissioner received application for the certificate of title. I am prompted by consideration of the equities which should be served in matters of this nature to suggest the foregoing procedure to the commissioner.

This opinion is not unmindful of the admonition contained in 60 C. J. S., Motor Vehicles, §42, that:

One holding a lien on a motor vehicle, as far as he can reasonably do so, must protect himself and others dealing in good faith by complying and requiring compliance with the provisions of the law concerning certificates of title, and if he is derelict in his duty he must suffer the consequence of his own negligence.

Instead, this opinion recognizes the wisdom contained in the above but is compelled, in light of the language employed, to consider that the legislature intended that an out-of-state lien holder should have until the issuance of a certificate of title to make known the interest he holds in the chattel.

Although the question of the relative rights of a lien holder

and an innocent purchaser is not germane to the question presented herein, nevertheless a brief discussion of such question will indicate that the above opinion does not affect the ultimate legal rights of a lien holder and the innocent purchaser of an encumbered vehicle.

In *Vincent v. General Motors Acceptance Corp.*, 75 So. 2d 778, the supreme court of Florida cited with approval its previous holding in *Livingston v. National Shawmut Bank of Boston*, 62 So. 2d 13, that:

There is nothing in Chapter 319, Florida Statutes, F. S. A., as amended by Chapter 23658, *supra*, to indicate that the Legislature intended to cut off the rights of holders of liens valid in and registered under the law of the State wherein such liens were created, as such rights had been previously enforced in this state under the rule of comity. Under this rule, as applied by the great majority of courts in other jurisdictions, the lien of a conditional sales contract duly recorded in accordance with the law of the state where made and where the property was situate at the time of the contract, is superior to and has priority over the rights and claims of innocent purchasers from or credits of a conditional vendee subsequently acquired in another state to which the chattel has been removed without the consent or knowledge of the conditional vendor.

It is interesting to note that the rule contained in the above-quoted language was not always applicable in Florida.

Prior to the amendment of Ch. 319, F. S., by Ch. 23658, 1947, the supreme court, in *Lee v. Bank of Georgia*, 32 So. 2d 7, at p. 10, held that such rule was obviated by §319.15, F. S. However, subsequent to amendment, the court, in *Livingston v. Nat. Shawmut Bank of Boston*, *supra*, at p. 14, stated:

Insofar as such final decree holds that the lien of the bank is superior to the rights of the Parrish Motor Company, we find no error. Section 319.15, Florida Statutes, F. S. A., as interpreted by this court in *Lee v. Bank of Georgia*, 159 Fla. 481, 32 So. 2d 7, 13 A. L. R. 2d 1306, no longer controls the rights of lien holders whose liens attached subsequent to August 1, 1949, by virtue of the provisions of Section 8 of Chapter 23658, Laws of Florida, Acts of 1947, Section 319.27, Florida Statutes, F. S. A. We are not, then, bound by the decision in the *Lee* case, since we are here concerned with a lien which attached subsequent to August 1, 1949.

Notwithstanding the above discussion, the sole question presented and answered herein relates to the responsibility of the motor vehicle commissioner to note the existence of a lien when issuing a certificate of title under §319.27(3), *supra*.

To the extent applicable, this opinion amends opinion 050-277, rendered by this office on June 6, 1950, and relating to a substantially similar question.

057-316—October 8, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—GUARANTEED SHORT TERM MORT-
GAGES, SECURITIES UNDER BLUE SKY LAW—
CH. 517, §§517.02, AND 517.05, F. S.**

To: Florida Securities Commission, Tallahassee

QUESTION:

Are certificates issued by a corporation evidencing assignments of mortgages and mortgage indebtedness to a named person, firm or corporation, guaranteeing absolutely and unconditionally the full payment of the mortgage indebtedness and "a twelve per cent net return on his investment," the assignor to collect interest and principal and remit to the investor securities under Ch. 517, F. S.?

The certificate, in addition to assigning the mortgage and the indebtedness secured by it (the mortgage and evidence of the indebtedness secured by it evidently are held in escrow by the assignor for the benefit of the assignee), guarantees payment of the principal of the mortgage and interest on the consideration paid for the assignment, evidently without regard to the interest payable under the mortgage, at the rate of 1% per month or 12% per annum. The certificate goes beyond an endorsement or assignment with recourse but also guarantees payment of the principal and interest at the rate of 12% per annum.

When the definition of a "security" within the purview of Ch. 517, F. S., (§517.02(1), F. S.) is measured with the above facts and circumstances, we feel that the certificate in question is a security under the said definition. Securities statutes, such as Ch. 517, F. S., are liberally construed and are for the protection of the public (Anno. 163, A. L. R. 1052). Some courts have held that the phrase "investment contracts" include agreements whereby purchasers or investors look entirely to the efforts of others to make their investment a profitable one (Anno. 163 A. L. R. 1055), which would seem to be applicable here. Promissory notes secured by mortgage, especially when payable more than a year from date (see §517.05(9), F. S.), have been held securities (People v. Leach, 106 Cal. App. 442, 290 P. 131 and Re. Leach, 215 Cal. 536, 12 P. 2d 3).

In the light of the above authorities we feel that the above question should be and it is hereby answered in the affirmative.

057-317—October 15, 1957

LEGISLATURE

**IMPEACHMENT PROCEEDINGS, JUDGE HOLT—COMPENSA-
TION OF HOUSE MANAGERS BEASLEY AND MUSSEL-
MAN—H. R. 122-X, 1957; §11, ART. XVI, §4, ART. XVI
AND §29, ART. III, STATE CONST.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May members of the legislature be paid extra compensation as provided by the following resolution (122-X, 1957,) in the light of §11, Art. XVI, State Const.?

2. If question 1 is answered in the affirmative, is there a lawful appropriation as required by §4, Art. IX, of the constitution?

(BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA:

That the speaker of the house of representatives, the Hon. Doyle E. Conner, and the administrative committee through its chairman, Rep. Mallory E. Horne, are directed and authorized to compensate the house managers, Representatives Tom Beasley and Jack Musselman, the sum of \$2000 each for special legal services rendered in behalf of the house of representatives during recent impeachment proceedings. This amount to be paid by the house of representatives as a part of its regular legislative expense.)

In my opinion both questions should be answered in the affirmative.

Section 29, Art. III, State Const., vests the power of impeachment in the house of representatives. The exercise of this power lies within the sound discretion of the house. Preliminary investigation to preferring articles of impeachment, appointing managers in connection with the prosecution of the articles, and other incidental details all lie within the prerogatives of the house.

It is necessarily implied that all reasonable expenses and compensation for services rendered in connection with such impeachment proceedings shall be determined by the house and paid as a part of its legislative expense. Otherwise, the house would be seriously handicapped in its discharge of this constitutional function if it were dependent upon the joint consent of the senate. Our previous opinions wherein we held that expenditures by interim committees for staff salaries and expenses could only be made pursuant to appropriations resulting from an enactment do not apply to the necessary expenses incident to the house performing its constitutional duty in impeachment proceedings. See Attorney General's opinions 055-112, p. 146, A. G. Biennial Report 1955-1956; 055-317, p. 407, A. G. Biennial Report 1955-1956; 056-205, p. 729, A. G. Biennial Report 1955-1956; and 056-258, p. 808, A. G. Biennial Report 1955-1956, and others. No legislative appropriation other than the act providing for general legislative expenses of the 1957 session is necessary. It was at this session that the impeachment articles were voted and the house managers designated. By action of the senate pursuant to authority of §29, Art. III, the trial of the articles was postponed until a time after the adjournment of the regular session. However, it lay within the power of the house at the recent special session by appropriate vote to discharge unfinished items of business relating to the impeachment proceedings. This included the fixing of compensation for the house managers.

Extra compensation under §11, Art. XVI, State Const., to members of the legislature as such is not involved. The two house managers, though members of the legislature, were serving in a capacity and performing functions outside the scope of their regular, usual and traditional legislative duties.

057-319—October 9, 1957

LABOR

WORKMEN'S COMPENSATION LAW—PERMANENT DISABILITY AFTER OTHER PERMANENT PHYSICAL IMPAIRMENT—§§440.15(5)(d), 440.21(2) AND 440.05, F. S.

To: R. O. Culver, Division of Corrections, Tallahassee

QUESTION:

Are waivers executed by a prospective employee effective to waive rights to workmen's compensation for disability or death resulting from his previous physical condition of hypertension?

Section 440.15(5), F. S., establishes a special disability fund to encourage the employment of persons who have a "permanent physical impairment." Permanent physical impairment is defined in §440.15(5)(d) 1., F. S., as "any permanent condition due to previous accident or disease or any congenital condition which is or is likely to be a hindrance or obstacle to employment." The statute provides that if, because of an injury or occupational disease, a permanent disability results to an employee who has a previous permanent physical impairment, the special disability fund shall bear the difference between the actual compensation paid to the employee and the compensation which would have been paid for the injury or occupational disease by itself and not in conjunction with the previous physical impairment. Section 440.15(5)(d), 3. and 4., F. S., read as follows:

3. Permanent disability after other permanent physical impairment.—If an employee who has a total or partial loss or loss of use of one hand, one arm, one foot, one leg or one eye, or who has other permanent physical impairment incurs a subsequent disability from injury or occupational disease arising out of and in the course of his employment resulting in a permanent disability caused by both conditions that is materially and substantially greater than that which would have resulted from the subsequent injury or occupational disease alone, the employer shall in the first instance pay all benefits provided by this chapter, but such employer shall be reimbursed from the special disability fund created by this paragraph for all benefits paid in excess of those allowed for such injury or occupational disease when considered by itself and not in conjunction with the previous permanent physical impairment.

4. When death results.—If the subsequent disability of such employee resulting from an injury or occupational disease arising out of and in the course of his employment, as set forth in subparagraph 3. of this paragraph, shall result in the death of the employee and it shall be determined that either the injury or death would not have occurred except for such pre-existing permanent physical impairment, the employer shall in the first instance pay the funeral expenses and the death benefits prescribed by this chapter, but he shall be reimbursed from the special disability fund created by this paragraph for all benefits payable in excess of those allowed for

such subsequent injury or occupational disease when considered by itself and not in conjunction with the previous permanent physical impairment.

There is, therefore, no risk to any employer who hires handicapped persons. If such employees are injured in their employment, the greater loss occasioned because of their previous impairment will be borne, not by the employer but by the special disability fund.

Section 440.21(2), F. S., provides that "No agreement by an employee to waive his right to compensation under this chapter shall be valid, unless he has rejected the chapter as provided in §440.05."

Your question is, accordingly, answered in the negative. The waivers which would have been executed by the handicapped employee are of no effect and such waivers are an unnecessary attempt to protect the employer as the statutes have already provided that protection by the special disability fund.

057-321—October 10, 1957

CORPORATIONS AND BUSINESS TRUSTS

FOREIGN CORPORATIONS TRANSACTING BUSINESS IN FLORIDA—LICENSES—CH. 613, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is a foreign corporation owning rental real property in this state transacting business in this state where such property is managed and rented through real estate agents or brokers in this state?
2. If the 1st question is answered in the affirmative are such foreign corporations required to obtain an occupational license tax in this state?

The legislature by Ch. 5717, 1907, raised a general prohibition against corporate recognition of unlicensed foreign corporations by which not only the transaction of all corporate business, but the acquisition, holding and disposition of property was made absolutely and without reservation unlawful (*Herbert H. Pape, Inc. v. Finch*, 102 Fla. 425, 136 So. 496, text 502); however, this general and rigid prohibition was modified and relaxed by Ch. 6876, 1915, in so far as the title to property acquired, held and disposed of in violation of the statute is concerned. Contracts in connection with the purchase or sale of property by a foreign corporation were not void but were unenforceable until a permit to transact business in this state was obtained (*Harris v. Zeuch*, 103 Fla. 183, 137 So. 133, text 139; *Hogue v. D. N. Morrison Constr. Co.*, 115 Fla. 293, 156 So. 377, text 378-9; *Crockin v. Boston Store*, 137 Fla. 853, 188 So. 853, text 857). A single transaction, such as the purchase of a tract of land in this state, is not usually considered as doing business in this state, so long as nothing more is done in that connection (*Crockin v. Boston Store*, *supra*, text 855).

It, therefore, appears that the purchase of a single lot or parcel of land in this state, for example the purchase of a shopping center in this state, does not of itself constitute a general transaction of business in this state; however, when such owner

leases rooms or areas in such shopping center to tenants from time to time and collects such rents, maintains and repairs such property and otherwise manages such property, other problems and questions arise. Generally a foreign corporation may be said to be doing, transacting, carrying on or engaging in business within a state when it transacts some substantial part of its ordinary business therein (20 C. J. S. 46, §1829). To determine whether the activities of a corporation constitute "doing business within a state" requires an examination of the facts in each case (*Higgins v. Com'r of Internal Rev.*, 312 U. S. 212, 61 S. Ct. 475, 85 L. Ed. 783, text 788). In *Hollingsworth and Whitney Co. v. State*, 241 Ala. 96, 1 So. 2d 387, text 389, the company, a paper and pulp manufacturing company, was in the process of constructing a plant in Alabama, however, the said plant had not progressed to the extent that it could be used for the manufacture of paper. The company, claiming that its business being the manufacture of paper and pulp, contended that it was not then doing a business in Alabama so as to be liable for a franchise tax. The court in this connection remarked that "the agreed facts show that the taxpayer has certain dwelling houses on its land where the plant is being constructed, which it has rented out and that it has the proceeds of such rents collected in hand, and that those dwellings and the funds so collected should be treated 'as capital employed in doing business in Alabama and they are so set up in the balance sheet.' We think that this state shows a doing of business in Alabama."

In *5th Ave. 14th St. Corp. v. U. S. Ct. Cl.*, 45 Fed. Sup. 222, text 224, the court had before it a corporation owning a 16-story building leased to some 28 tenants, managed by an agent. The agent made the leases for and on behalf of the corporation, subject to its approval. The corporation was held to be doing business where the lands and building were located. The facts in this case differed from the facts in *U. S. v. Emery, Birt, Thayer Realty Co.*, 237 U. S. 28, text 31, 35 S. Ct. 501, 59 L. Ed. 825, where a corporation owning real property had leased the said real property under a long time lease to a single tenant, there the corporation was held not to be doing business where the real property was located. In this case the court remarked that the question was what *was* the corporation doing not what it could do under its charter. "The acquisition and holding of real estate situated within a state; the management or development of such property; the making of sales or contracts for the sale of such property, or of property elsewhere; the carrying on of a real estate brokerage business; the leasing of a machine for use in the state," have been held to constitute doing business in a state (20 C. J. S. 47, §1829).

Although the management of real property and the leasing of units therein may be delegated by a foreign corporation owner to an independent real estate agent or broker, duly licensed under the statutes and laws of this state, such agent or broker would nevertheless be an agent of the said foreign corporation. Such foreign corporation would be acting in this state by and through an agent selected by it; such foreign corporation would be transacting business in this state; and the 1st question should be answered in the affirmative.

In *State v. Heymann*, 178 La. 479, 151 So. 901, text 903, the court remarked that "the operating or managing of an office building, whether by the owner or by a lessee of the building, is now well recognized as the carrying on of an occupation or business." In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, text 421, the court remarked that "we think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, making investments, *managing office buildings*, . . . are engaged in business . . ." The court in *Hecht v. Malley*, 265 U. S. 144, 44 S. Ct. 462, 68 L. Ed. 949, text 959, remarked that "a corporation owning and renting an office building is engaged in business within the meaning of an excise statute . . ." We, therefore, feel that foreign corporations owning, operating, managing an office building in this state and renting space therein would be liable for the same license and license tax as would a Florida corporation owning, operating and managing an office building under like or similar circumstances, if any.

The 1st question is, therefore, answered in the affirmative. Under the 2nd question the foreign corporation mentioned would be required to obtain the same license, if any, as would a Florida corporation under the same circumstances.

057-322—October 11, 1957

COURTS

SMALL CLAIMS COURT, BAY COUNTY—JURISDICTION OF CAUSES OF ACTION ARISING ON FEDERAL RESERVATION—§§42.03 AND 46.01, F. S. AND §§6, 7, ART. V, STATE CONST.

To: *D. C. Suggs, Jr., Judge Small Claims Court, Panama City*
QUESTION:

Does the small claims court for Bay county, have jurisdiction of causes of action arising on a federal reservation or territory over which jurisdiction has been ceded to the U. S.?

Under §1, Ch. 30341, 1955, as amended by Ch. 57-571, 1957, the small claims court in and for Bay county, appears to have jurisdiction of cases at law in which the demand or value of the property involved does not exceed, exclusive of attorney's fees, interests and costs the sum of \$500 (§§1, Ch. 30341 and 57-571, acts of 1955 and 1957; §42.03, F. S.). Cases involving the legality of any tax, assessment or toll, action of ejectment, and actions concerning boundaries (§6, Art. V, State Const.) and of proceedings relating to forcible entry or unlawful detainer (§7, Art. V, State Const.) do not appear to be within the jurisdiction of the said small claims court. The venue for cases within the jurisdiction of the small claims court appears to be in the county where the defendant resides, or where the cause of action accrues or where the property in litigation is located (§46.01, F. S.).

After a state's cession of lands within its borders to the exclusive jurisdiction of the U. S., the area is beyond the operation of the state laws as such, although those in effect at the time of the cession continue in force in the ceded territory as federal laws until changed by congress and unless in conflict

with federal laws (54 Am. Jur. 599-601, §87; *Capetola v. Barclay White Co.*, CCA 3rd, 139 Fed. 2d. 556, 153 A. L. R. 1046, certiorari denied 321 U. S. 799, 64 S. Ct. 939, 88 L. ed. 1087). The federal courts seem to have jurisdiction over the lands as federal territory. Local actions would seem to be required to be brought in the federal court whose district included the ceded territory.

Actions are classified as "local actions" which must be brought in a particular place or territory (1 C. J. S. 946, §1) and "transitory actions" which may be brought wherever jurisdiction may be obtained over the defendant (1 C. J. S. 949, §1). "As a general rule, transitory actions may be brought in any court of general jurisdiction in the county or district in which defendant can be found and served with process, but local actions may be brought only in the particular place specified" (92 C. J. S. 677, §7). Stated in general terms a transitory action is one founded on a transaction which could have taken place anywhere, while a local action is based on a transaction which could only have happened in a particular place (92 C. J. S. 678, §8). We will not attempt any further distinction between local and transitory actions, however, see 92 C. J. S. 677, et seq., §§7 et seq., 56 Am. Jur. 5-7, §3; *Hartford Accident & Indemnity Co. v. Thomasville*, 100 Fla. 748, 130 So. 7, text 8; *Linger v. Balfour*, 102 Fla. 591, 136 So. 433; *State v. Barrs*, 152 Fla. 631, 12 So. 2d 576, text 577.

From the above and foregoing it appears that the small claims court for Bay county has jurisdiction of transitory actions although they arise on a federal reservation or territory over which jurisdiction has been ceded to the U. S.; but not of local actions arising on such reservation or territory although they be in Bay county.

057-323—October 11, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
HOTEL AND RESTAURANT COMMISSION—LICENSES RE-
QUIRED FOR KITCHENS OPERATED IN CONJUNCTION
WITH OUTDOOR THEATRES—§§509.241(2)(b)5.
AND 205.61, F. S.**

To: *Robert J. Kloeppel, Jr., Restaurant Commission, Tallahassee*
QUESTION:

Are so-called outdoor theatres, which are equipped with kitchen facilities to prepare and serve hot meals and sandwiches, included in the exception granted to theatres under §509.241(2)(b)5., F. S., as amended by Ch. 57-389?

From an examination of this statute it is noted that paragraph 5., supra, was added to this statute for the first time in 1957 and a reference to §205.61, F. S., is made, which is the occupational license tax section, relating to theatrical shows, traveling players and minstrels in *buildings* fitted up for such shows or exhibitions. In order to answer your question, we must ascertain the intention of the legislature and effectuate that intent.

Other than the fact that §205.61, F. S., referred to in paragraph 5., supra, refers to plays and shows in *buildings*, it is com-

mon knowledge that theatres, as the word is generally understood by the public, are buildings where plays and shows are exhibited and that the food items customarily served to patrons of such theatres are candies, gums, popcorn, crackers and the like and perhaps in some instances pre-prepared and wrapped sandwiches but these theatres, as the word is generally understood, do not have attached thereto kitchens for the purpose of preparing and serving hot foods.

On the other hand, the entertainment facility known as the "outdoor theatre" normally and usually has attached or connected to it a complete kitchen and serving counter equipped with both seating facilities and service windows. A large part of the food items served, except for cold drinks, ice cream and milk products, are prepared, cooked and served on the premises of the outdoor theatre.

This office has held that a private individual operating a restaurant building in a private park, leased from a state agency, is liable for all licenses and fees for inspection purposes (A. G. B. R., 1949, p. 470).

We have likewise held that the state hotel license fees are not occupational license taxes and that veterans of the Spanish American war and world wars I and II are not exempt from such fees (A. G. B. R., 1947, p. 268).

This office has also held that where a company, as agent for the U. S. maritime service, operated restaurants on state property and the state had not ceded jurisdiction over the area, regulation by the state hotel commission for the protection of public health was a valid exercise of the state's police power (A. G. B. R., 1944, p. 247).

We have previously held (A. G. B. R., 1946, p. 609) that a place such as a service station, theatre or drug store, which sold only wrapped sandwiches, and did not serve them as an article of food and did not provide accommodations for their consumption on the premises by way of seats, tables or other facilities usually provided for such purposes, was not defined as a restaurant and was not subject to a license issued by the state hotel commission.

The hotel and restaurant business directly affects the health, safety and welfare of the public and the public is interested to such an extent that reasonable laws may be enacted for the control and regulation of such businesses (So. Bell Tel. and Tel. Co. v. 1901 Collins Corp., Fla., 83 So. 2d 865).

In the light of the foregoing, it is my opinion that all theatres, as they are generally known, which do not maintain and operate kitchens in connection with such theatres but merely serve items pre-prepared, fall within the exception and classification of paragraph 5., supra, and that the so-called "outdoor theatres," which maintain and operate kitchens for the purpose of serving hot foods to their clientele, are not exempt from the license fees required by Ch. 509, F. S., nor are they exempt from inspection, regulation and control by the Florida Hotel and Restaurant Commission.

057-324—October 14, 1957

CRIMES

VIOLATION OF STATE LOTTERY LAWS—BINGO GAMES TRAILER PARK

To: *Paul B. Johnson, Hillsborough County Solicitor, Tampa*
QUESTION:

The management of a trailer park, catering to permanent residents, administers a fund designated "The Friendship Fund," which is maintained by voluntary contributions of \$1 a month from each of the residents of the trailer park who care to contribute. The money in this fund is used to purchase flowers to send to ill residents of the park and to purchase funeral wreaths for those residents who pass away. So far as is available, the money in said fund is used to help defray expenses of regular social gatherings, sponsored by the management of the trailer park, which gatherings frequently feature fish fries and hamburger fries, etc.

The management of the trailer park desires to sponsor regular, weekly bingo games open to all residents of the trailer park only. In order to encourage attendance at such social gatherings, the management will contribute sums of money towards the purchase of prizes to be awarded at such bingo games and also such sums of money from the "Friendship Fund" as are available, will be applied toward the purchase of prizes to be won at such bingo games.

Will you please advise me concerning whether bingo games operated under such a stated set of circumstances will constitute a violation of the laws of Florida?

In opinions filed April 29, 1953 and Aug. 31, 1956, this office ruled on similar situations as constituting violations of our lottery laws.

The elements of prize and award by chance are self-evident in the situation presented by you. The remaining element, viz: consideration, is present in that part of the money used for purchasing the prizes will come from the \$1 contributions made by the residents of the trailer court. Secondly, the satisfaction or thrill of participating in the bingo games constitutes a certain degree of inducement to the residents to remain in this particular court, and could well constitute inducement to the general trailer public to patronize this particular court, rather than other courts in that area, thus enhancing the value of the court.

This question is discussed at length in *Creash v. State, Fla.*, 179 So. 149.

Your question as presented is therefore answered in the affirmative.

057-326—October 15, 1957

COURTS

JUVENILE COURTS—SELECTION AND APPOINTMENT OF
COUNSELORS AND ASSISTANTS—§11, ART. VIII, §12,
ART. V, AND §27, ART. III, STATE CONST.; CH.
39, AND §39.16, F. S.

To: LeRoy Collins, Governor of Florida, Tallahassee

QUESTIONS:

1. Are juvenile court counselors and assistant counselors selected and appointed by the governor or otherwise?

2. Are such counselors and assistant counselors constitutional officers, and if so is §27, Art. III, State Const. applicable thereto?

3. For what terms, if any, are juvenile court counselors and assistant counselors selected and appointed?

Under §12, Art. V, State Const. as adopted at the general election in 1956, the state legislature is empowered and authorized to establish juvenile courts in the several counties and "to provide for the qualification, *election or selection and appointment* of judges, *probation officers* and such other officers and employees of such courts as the legislature may determine and to fix their compensation and *term of office*; . . . without being limited therein by the provisions of this constitution . . . as to *election or appointment of officers* in section 27, article III, . . . or other existing conflicting provisions of this constitution." (Emphasis supplied.)

The jurisdiction, personnel and powers of juvenile courts in this state are generally provided for by Ch. 39, F. S., §39.16 of which provides for the qualifications, selection and tenure of juvenile court personnel other than the judges of such courts. Subsection (2) of said section provides that "the counselor shall be selected and appointed by the judge, and each assistant counselor shall be selected and appointed by the counselor with the approval of the judge. . . ." Under subsection (5) of said section "employees of the juvenile court, other than the counselor and assistant counselor, shall be selected and employed by the counselor with the approval of the judge . . . (or) by the judge if their duties are performed primarily directly under the supervision of the judge."

Subsection (8) of said §39.16, provides that "all persons as chief or head or assistant probation officers of juvenile courts . . . who were appointed for definite terms pursuant to special or general acts, shall continue to serve during the term for which the appointments were made . . . and at the end of each term the selection and appointment of counselors and assistant counselors . . . shall thereafter be in accordance with this chapter" We do not think that §11, Art. VIII, State Const., has any effect upon above mentioned §12, Art. V, State Const., or Ch. 39, F. S.; in that it is recited in paragraph (f), subsection (1) of said §11, Art. VIII, "that there shall be no power to abolish or impair the jurisdiction of the Circuit Court, or to abolish any other court provided for by this constitution or by general law, or the judges or clerks thereof, although such charter may create new

courts and judges and clerks thereof"

Section 12, Art. V, State Const., and Ch. 39, F. S., enacted pursuant thereto, govern the selection and appointment of juvenile court counselors and assistant counselors (formerly usually designated as probation and assistant probation officers in many local and special as well as general laws); which is by the judges of the juvenile courts or with their approval. No provision is made in said Ch. 39, F. S., for appointment or selection by the governor. Counselors and assistants serving definite terms under gubernatorial appointment, when Ch. 39, F. S., became effective, were authorized to serve out their then existing terms. Said chapter provides that the places held by them be filled by the juvenile judges and under their approval.

Section 4, Ch. 19002, 1939, appears to have made provision for the appointment of probation and assistant probation officers for Dade county, by the judge of the juvenile court for Dade county; however, in *State v. Martens*, 141 Fla. 666, 193 So. 835, such probation officers and assistants were held to be officers of the county within the purview of §27, Art. III, State Const., to be appointed by the governor or elected by the people. The rule in *State v. Martens* is conclusive unless there has been a change in the constitutional law of Florida. There has been no express amendment of said §27, Art. III. However, examination of §12 Art. V, adopted at the general election of 1956, which appears to be substantially identical if not identical with former §50 (48), Art. V, State Const., adopted in 1950, reveals authority in the legislature to "provide for the qualification, election, or appointment of judges, *probation officers* . . . and to fix their compensation and term of office . . . without being limited therein by the provisions" of the state constitution "as to election or appointment of officers in section 27, article III . . . or other conflicting provision of this constitution." (Emphasis supplied.) This provision in said §12, Art. V, State Const., appears to have excluded §27, Art. III, from any operation on said §12, Art. V, in so far as the selection and appointment of counselors and assistant counselors (probation and assistant probation officers). Although such counselors and assistant counselors appear to be officers, within the purview of *State v. Martens*, supra, §27, Art. III, State Const., by reason of provisions in said §12, Art. V, of the said constitution, is no longer applicable to the selection and appointment of such officers. Such counselors and assistant counselors are probably within the purview of §15, Art. IV, State Const., and subject to suspension for cause. Chapter 39, F. S., has been in force and effect since Oct. 1, 1951, so that any terms of juvenile court counselors and assistant counselors then existing have long since expired, in the absence of some local or special act providing otherwise, of which we are not advised.

The above stated questions are, therefore, answered as follows:

1. Juvenile court counselors are selected and appointed by the juvenile judge, and the assistant counselors by the counselors with the approval of the juvenile judge. This has been the rule since Oct. 1, 1951. Such officers appointed by the governor prior to said Oct. 1, 1951, were permitted to serve the unexpired portions of their term, after which their selection and appointment has been according to the above rule.

2. Juvenile court counselors and assistant counselors are provided for by the constitution, although activated by the legislature, so that they are constitutional officers. By reasons of provisions in §12, Art. V, State Const., §27, Art. III, of the said constitution is not applicable.

3. Although Ch. 39, F. S., provides for the selection and appointment of counselors and assistant counselors, and sets up machinery for their discharge for cause, we find nothing therein fixing a definite term. They appear to be selected to serve during good behavior.

057-327—October 15, 1957

TAXATION

HOMESTEAD TAX EXEMPTION—RENTING DWELLING AND RESIDING IN TRAILER—§§1 AND 7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May the owner of real property in this state claim the same, or some part thereof, as his homestead and tax exempt, where he leases the dwelling thereon to others and resides on such property in a trailer?

Application for homestead tax exemption was filed with one of the county tax assessors of this state, which tax assessor, upon investigation and examination, ascertained that such owner had leased his dwelling and was residing in a trailer parked on the premises claimed as tax exempt. There has been purchased for the trailer a motor vehicle license and license tag. The trailer is on wheels and is not placed on a permanent foundation but is resting on its wheels.

Homestead tax exemptions are provided for by §7, Art. X, State Const. For one to be entitled to homestead tax exemption he must be possessed of a *legal or equitable title to the property* claimed as tax exempt and *must reside thereon and in good faith make the same his permanent home* or the permanent home of persons legally or naturally dependent upon him. The homestead here contemplated is of the area and nature of the homestead exemption from execution defined in §1, Art. X, State Const., which may consist of an area of 160 acres or less if outside of an incorporated municipality and of one-half acre or less if within an incorporated municipality. In each case there is included the improvements on the property; however, the improvements on a homestead within a municipality may not extend to more improvements than the residence and business house of the owner. We are not advised of the location of the homestead specifically in question; whether within or without an incorporated municipality.

The primary question to be determined in each application for homestead tax exemption is whether the applicant "has the legal title or beneficial title in equity to the real property" claimed as tax exempt, and whether he "resides thereon and in good faith makes the same his or her permanent home . . ." "The acquisition or existence of the homestead depends largely, although not entirely, on the intention of the parties, which has been said to be the prime factor in impressing property with the homestead character . . . There must be a bona fide intention of making the

residence a homestead or permanent residence and occupying it as such, exclusively of any other dwelling place, and mere occupancy without such intention will not suffice. The question of intent is to be determined by all the surrounding facts and circumstances, and not necessarily by the representation of the parties" (40 C. J. S. 456, §30). The question of residence and its permanency, although influenced by the nature of the dwelling, is not answered by that alone, but must be determined, from all the facts and circumstances, by the tax collector in the first instance. The fact that the homestead claimant is residing in a trailer or other type of residence subject to almost immediate movement to another state or county does not disprove his intention to make the real property upon which located his permanent home, although it should be taken into consideration with all other facts and circumstances. Doubtless such a type of residence should not be considered as strongly as would a permanent dwelling in determining intention.

Once it is determined by the tax assessor, or by the board of equalization, that the applicant makes his or her permanent home upon the premises, it may become necessary to determine whether any part of the property claimed as tax exempt is or is not homestead property. Here we must remember that a municipal homestead may not "extend to more improvements or buildings than the residence and *business house* of the owner." Should we presume that the evidence shows that the applicant makes his home in the trailer, then we must determine whether such home is permanent or temporary. Unless the rental of the building mentioned is for a temporary period of time, such as for a winter or summer season (*Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529) its use for other than the owner's business house would probably constitute an abandonment of it as a part of the owner's homestead. It has been held that an apartment house, upon the lands claimed as homestead property, is not a business house of the owner (*Ewen v. Larson*, 136 Fla. 1, 185 So. 866), and that where the owner of a homestead permits another to construct and occupy a building on the homestead property that a partial abandonment results (*Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588); in this connection see also *Cowdery v. Herring*, 106 Fla. 567, 143 So. 433, 144 So. 348). These authorities seem to relate to homesteads within incorporated municipalities. Under such conditions should the tax assessor determine that the trailer is in fact the permanent home of the claimant and that the rental of the dwelling was not for a temporary period, so as to be within the purview of *Jacksonville v. Bailey*, *supra*, but amounts to an abandonment of the rented dwelling and its curtilage, then he should divide the real property into two parcels, one including the dwelling and its curtilage, and the other the area upon which the trailer (which usually would include the remaining portions of the lot) is located and used as a homestead. Under such a finding the dwelling and its curtilage would be subject to taxation and the remainder would be entitled to tax exemption.

The above rule limiting the homestead within an incorporated municipality to the dwelling and business house of the owner is not applicable to rural homesteads, that is homesteads without incorporated municipalities (*Armour & Co. v. Hulvey*, 73 Fla. 294, 74 So. 212). The rural exemption is a broader one. The right to

a homestead in rural property used primarily and in good faith as a residence would not be lost by the fact that it, or a part thereof, may be used incidentally for other purposes so long as the primary use is for residential purposes and not adverse to a claim of homestead rights (40 C. J. S. 464, §36). A reading of the *Armour & Co. v. Hulvey* case and the cited *Corpus Juris Secundum* page and section might be of assistance in this connection.

Where the owner of the dwelling house, claimed as homestead tax exempt, elects to reside on the premises in a trailer instead of such dwelling and to rent the said dwelling, there arises the question of abandonment of the said dwelling as a part of the homestead property, which question should be determined from the rules and observations set out in this opinion. No positive answer, either positive or negative, may be given to the above question on the facts before us.

052-328—October 22, 1957

TAXATION

DOCUMENTARY STAMP TAXES—STOCK SUBSCRIPTION CONTRACT—\$201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are stock subscription contracts which contain provisions for acceleration of installment payments in case a default and an option to the seller to waive unpaid balance and issue stock for the amount paid in, in lieu of enforcing full payment, subject to documentary stamp taxes?

Under the subscription contract in question the subscriber subscribes for a stated number of shares of stock at a stated price per share payable not less than 15% down and the balance in 12 consecutive monthly installments with interest. It is expressly provided that no stock will be delivered until the subscription has been paid in full; however, the subscription contract contains the following:

In event of default in the payment of any installment on this contract, for a period of 30 days, the entire remaining unpaid balance shall become immediately due and payable and in the event of default thereon, the seller *shall have the right* to charge against my total payments hereon all cost of this sale and the gross interest, and cause stock to be issued to the subscriber to the nearest share for the sum remaining in my account after such charges are deducted.

The above quoted portion of the subscription contract provides that the seller *shall have the right*, not that he shall at all events, to issue stock in the amount paid on the contract in lieu of resorting to process to enforce the unpaid portion of the subscription contract. We construe this provision to be a mere option to the seller, and that he may elect to enforce the unpaid balance due under the subscription contract in lieu of issuing such stock. Should the seller elect to enforce the terms of the contract and collect the unpaid balance, we do not think that the subscriber could use the above quoted option as a defense. The above quoted provision, although

not being the same as the provision in the subscription contracts involved in *Kirksey v. The Florida and Georgia Plank Road Co.*, 7 Fla. 23, and *Barbee v. Jacksonville and Alligator Plank Road Co.*, 6 Fla. 262, are of the same general nature and the rule there announced would seem applicable here. The right of the seller to issue stock to the subscriber for the amount paid in less expenses belongs exclusively to him, as an additional remedy in case of default. He has the right to either resort to such remedy or to resort to suit and enforce the unpaid balance of the subscription contract. (Anno. in 83 A. L. R. 898-909).

The subscriber's obligation is fixed by the subscription agreement and although payable in installments the total amount of the obligation is fixed by the terms of the contract and upon the payment of any number of installments the balance due on the subscription may easily be ascertained by simple mathematics. The stock subscription contract is *a written obligation to pay money* within the purview of §201.08, F. S.

The above stated question is answered in the affirmative.

057-329—October 16, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
AUTHORITY OF COUNTY COMMISSIONERS TO PURCHASE
REAL PROPERTY FOR GARAGE AND/OR STORAGE
SPACE—§§125.01(1) AND 101.34, F. S.**

To: *William D. Barrow, County Attorney, Crestview*

QUESTION:

May the county commissioners of Okaloosa county purchase either a building or a vacant lot on which to build a building to be used as a garage and maintenance shop for equipment and/or storage space for county voting machines?

In connection with county affairs, county commissioners are authorized to build and keep in repair, county buildings, roads and bridges. (§125.01(1), F. S., 1955).

Section 101.34, F. S., 1955, provides that the voting machines owned by a county be in the custody of a lawful designated custodian. It is well settled in this state that the county commissioners have only those powers expressly given them by the legislature, or those powers necessarily incident to carrying out those powers given them by the legislature (*Crandon v. Hazlett*, 26 So. 2d 638; 157 Fla. 574).

The above cited statutes seem to give the county commissioners the authority to build and keep in repair necessary county buildings. They also place certain duties on the board of county commissioners. The authority to build and maintain roads requires ownership by the county of certain mechanical equipment which, from time to time, most certainly requires maintenance and repair. The preservation of this equipment is a matter of utmost concern to the county commissioners.

It is my opinion that the above mentioned statute is broad enough to permit the purchase of a building and/or land on which to build a building to be used as a garage and maintenance shop for road building machinery.

As to the voting machines, a similar situation would seem

to exist for them, by the very nature of things, are instruments of a somewhat delicate nature and of necessity must be suitably stored for long periods of time. I am of the opinion that, as an incident to the statutory duties placed upon the county commissioners as above mentioned, they may purchase a building or land upon which to build a building to carry out the purposes outlined by the request.

Your question is answered in the affirmative.

057-331—October 22, 1957

AM. AGO 57-218

AM. AGO 57-287

INSURANCE

DEPOSITS UNDER §§631.06, 631.09 AND 648.02, F. S., AS AMENDED BY CH. 57-100—AGO'S 57-218 AND 57-287

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. Where two companies required to maintain deposits with the insurance commissioner merge, may the deposit of the merged company be returned to the continuing company?

2. Where under former §631.06, F. S., a fire insurance company has deposited with the insurance commissioner a surety bond, may the bond be terminated as to future possible claims as of midnight, June 30, 1956, or on the date the company complies with the provisions of §631.06, F. S., as amended by §5 of Ch. 57-100?

3. Under §§631.06 and 648.02, F. S., as amended by Ch. 57-100, itemize circumstances and conditions under which deposits under the sections prior to amendment may be returned to the respective depositing insurers?

You have orally requested further explanation of the above amended sections as dealt with in opinions 057-218 and 057-287; and you requested advice concerning the additional questions set forth above.

The questions are answered as follows:

1. It is to be observed by reference to said opinions that §§631.06 and 631.09, F. S., were amended by Ch. 57-100; but that §§631.07 and 631.08, F. S., were not affected by such amendments. It now becomes necessary to determine whether §631.10, F. S., has been disturbed by the amendments. Attention is directed to the opening words of the section: "If any *fire insurer* shall cease to carry on business in this state, and its liabilities, whether fixed or contingent. . . ." The italicized words find explanation in the requirements of §631.06 prior to its 1957 amendment. However, in addition to the changed provisions concerning amounts of deposits, amended §631.06 now requires in addition to fire insurers, deposits by casualty and title companies. It is doubtful that any part of §631.10 remains effective. However, considering the purpose of the deposit required by §631.06, while statutory conditions precedent to the return of such a deposit to the depositing insurer would be helpful, such lack of statute is not too alarming. Turning to surety companies, it appears that amended §648.02(3) provides in part: "Whenever such company ceases to do business in

this state, and has settled up all claims against it, and has been released from all the bonds upon which they have been taken as sureties, said bonds shall be delivered up to the proper parties on presentation of the commissioner's receipt for said bonds."

The word "merge" as used in this question is given the meaning apparent from §§608.20-608.26, F. S., and as defined in *Barnes v. Liebig*, Fla., 1 So. 2d 247; "A merger of corporations exists where one of the constituent companies remains in being, absorbing or merging into itself all other constituent companies."

With these remarks, the question is answered as follows:

Until the continuing company can demonstrate to the insurance commissioner that all fixed and contingent liabilities of the merged company under its contracts have been fully satisfied or have ceased to exist, the commissioner should not release to the continuing company the deposit of the merged company.

2. It is recognized that while the change in the deposits as result of amendment of §631.06 became effective July 1, 1957, it has taken time to carry out such changes. It is to be noted that prior to its amendment, §631.06 required a \$20,000 deposit of each "fire insurance company," either in described securities or in the form of a surety bond. Amended §631.06 requires a deposit of \$50,000 in described securities, as conditioned and set forth, by fire, title and casualty companies. Even though there may be delay in compliance, once the commissioner accepts the \$50,000 deposit or one of the certificates contemplated by §631.06(4), as amended, that deposit, as to a company operating in Florida prior to July 1, 1957, is effective as of that date. Nevertheless, where a fire insurance company had delivered to the commissioner prior to July 1, 1957, a surety bond as required by §631.06 prior to its amendment, that bond should be maintained in effect until the commissioner is satisfied that amended §631.06 has been complied with.

3. Before setting forth conditions to be met by insurers under amended §§631.06 and 648.02, the answer to the 3rd question in opinion 057-287 is subjected to amendment. The question was as follows:

3. Where a Florida resident has a claim against a company arising under either of the above sections, may the claim be taken up directly with the Florida department, or must the Florida resident seek assistance from the insurance commissioner in the state in which such company maintains its voluntary deposit?

The answer to that question was that, the deposit of such securities with officials of another state will meet the requirements of amended §§631.06 and 648.02 only if under the laws of the state where the deposit was made a Florida judgment obtained on a policy is payable out of such deposit by the filing with the appropriate official of such other state duly authenticated records thereof without the necessity of proceedings in such other state. While it may be that such should have been provided in these amended sections for the protection of Florida policy and contract holders, that answer goes beyond the wording of the amended sections. The answer to question 3 in opinion 057-287 is amended to read:

3. Under the circumstances set forth in the question, a Florida claimant should take the matter up directly

with the insurance commissioner or other official of such other state with whom the deposit has been made. Just what relief will be found there must depend upon the applicable laws of the state where the deposit is held.

Like matter in opinion 057-218 is amended accordingly.

With this amendment we itemize the conditions to be met by a fire, title and/or casualty insurance company under amended §631.06:

(a) That such a company has deposited with the insurance commissioner of Florida "for the protection of all policyholders and creditors" securities as described in the amount of \$50,000; or

(b) As to a foreign insurer, that the insurance commissioner of this state has been furnished with certificate of the insurance commissioner or other officer of the state of domicile of the insurer that the insurer has deposited with such insurance commissioner or other officer of said domiciliary state securities as prescribed in the preceding paragraph "for the benefit and protection of all its policyholders," in pursuance of law permitting such; or

(c) As to a foreign insurer, a like certificate from the "insurance commissioner or other officer of another state designated or permitted by the laws of such state to receive such deposit for the benefit and protection of all its policyholders."

(d) The above is subject to the following from the answer in opinion 057-218: "provided that if any judgment holder prior to said date (July 1, 1957) applied to the insurance commissioner for satisfaction of a judgment out of such deposit, and such was not accomplished by said date, the deposit should be retained (or surety bond remains liable) until that is done.

Generally, the same procedure is applicable to deposits for the protection of holders of contracts and conditions as provided in amended §648.02.

It is to be noted that except as to the answer to the 3rd question in opinion 057-287, and like statement in opinion 057-218, nothing in this opinion disturbs such previous opinions.

057-333—October 24, 1957

CRIMINAL PROCEDURE

SENTENCES AND JUDGMENTS—MODIFICATION OF SENTENCE, RECORDATION IN MINUTES OF COURT PROCEEDINGS—§§28.21(1), 31.11, 32.08, 921.02 AND 922.01, F. S.

To: *J. Louie Carter, Clerk, Criminal and County Courts, West Palm Beach*

QUESTION:

When the judgment and sentence previously imposed is modified and a new sentence is imposed by the criminal court of record, should the minutes show the modification and new sentence before the clerk of said court is authorized to issue a commitment thereon?

In *Wade v. Coniers* (Fla.), 109 So. 453, in a decision involving a commitment issued by the clerk of a county court, the supreme

court of Florida said that all judgments of conviction or sentences are required to be entered in the minutes of the court and that a clerk of a court is not authorized to issue a commitment except when the minutes show the record of a conviction and sentence of the accused.

In the later case of *Bass v. Doolittle* (Fla.), 112 So. 892, the conviction in the county judge's court was shown by docket entries, not by minutes, and the supreme court held this to be sufficient, pointing out that the county judge was required to keep a docket but not minutes, while a county court such as was involved in *Wade v. Coniers* was required to keep minute books.

Section 32.11, F. S., provides that the clerk of a criminal court of record shall have the same powers, duties and obligations as are exercised and imposed on clerks of circuit courts, and §28.21(1) requires the clerk of the circuit court to keep minute books in which he shall keep minutes of the proceedings of the court and the judge in term. Therefore, these statutes, construed in the light of *Wade v. Coniers*, supra, require that the modification of judgment and sentence and the imposition of a new sentence by a criminal court of record in term time be shown by the minutes before the clerk of such court is authorized to issue a commitment therefor.

It will be noted that §28.21(1) requires that minutes be kept by the clerk of the circuit court of all proceedings in term but says nothing about proceedings in vacation, presumably because at the time the predecessor of §28.21(1) was originally adopted there were no proceedings of a circuit court which required the keeping of minutes except proceedings during term time. However, I understand that it is common practice for one term of a criminal court of record to run until the next term is about to commence, and when this practice is followed the court is practically always in term.

Further, §922.01 requires that when a defendant is committed to the sheriff's custody to serve a sentence requiring imprisonment, a certified copy of the sentence shall also be delivered to the sheriff, which requirement is applicable to sentences imposed by criminal courts of record. When a sentence is pronounced orally, as most sentences are pronounced, I know of no way to furnish the sheriff a certified copy unless the sentence is first recorded in the minutes, regardless of whether the sentence be rendered in term time or in vacation and regardless of whether it is the original sentence or a modified sentence.

Moreover, §921.02, which is applicable to criminal courts of record, requires that judgments in criminal cases be entered on the minutes of the court, and this requirement should be complied with regardless of whether the judgment be the one originally imposed or is a modified judgment.

I note your reference to §32.08, F. S., as possibly having a bearing on the question under consideration. This statute was designed to permit the acceptance of a plea of guilty and the imposition of judgment and sentence consequent thereon during vacation as well as in term time, and I think that its requirement that such sentence and judgment be entered of record by the clerk of the criminal court of record applies only when entered upon a plea of guilty.

In the light of the foregoing observations, it is my opinion that your question is properly answered in the affirmative.

057-335—October 29, 1957

SHERIFFS

FEES IN CRIMINAL CASES—§§30.23 AND 30.47-30.54, F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Since Ch. 57-368, abolishes the fee system as the method of compensation for sheriffs, with certain exceptions, may the criminal arrest fees provided by §30.23, F. S., be assessed as costs in a given case in view of §5(1) of said Ch. 57-368?

Chapter 57-368 provides for the making of budgets for the office of the sheriffs of the state, sets forth the procedure for paying of salaries and expenses of the sheriffs' offices and for the disposition of fees and commissions collected by such sheriff. We are here particularly concerned with §5 of said act, the first subsection of which reads:

(1) No bills shall be rendered to the county for any services, nor shall any fees, commissions, or other remuneration for official services as sheriff be paid by the board of county commissioners of any county to the sheriff of the county except as provided by this act. *All fees, commissions and other remuneration provided by law for services other than criminal shall be charged by the said sheriff to other authorities and parties doing business with their offices, and shall be paid over to the county as provided in this section.* (Emphasis supplied.)

The italicized portion and particularly the words "other than criminal" indicate an intent by the legislature that criminal fees provided for sheriffs for services performed by them are abolished. We are informally advised that this construction has been placed upon the act by various sheriffs as well as your department. This conclusion is logically reached for it is provided in the act that no bill shall be rendered to the county for any services. It is common knowledge that a very large percentage of the sheriffs' fees prior to the passage of the act with which we are here concerned, were realized from bills properly presented, audited, and paid by the county concerned. Since the law prohibits bills from being presented to the county, to permit the fees for the items enumerated in §30.23 in criminal cases to be collected as court costs, would allow wholly constructive fees for services against the county. Such is not permissible (see *McLeod v. Santa Rosa*, 116 Fla. 838, 157 So. 37).

It is therefore my opinion that sheriffs' arrest fees cannot properly be assessed as a part of the court costs in criminal cases and the question should be answered in the negative.

This opinion is not to be construed as attempting to hold that a trial judge may not in his discretion assess costs against a defendant, but our conclusion is limited solely to the question of those fees provided in criminal cases under §30.23, F. S.

057-336—October 30, 1957

**REGULATION OF PROFESSIONS AND VOCATIONS
MASSEURS AND MASSEUSES—AUTHORIZED EQUIPMENT—
§480.01 AND CH. 458, F. S.**

To: Mrs. Edith Dearborn, Secretary-Treasurer, Florida Board of Massage, Miami

QUESTION:

May a registered masseur or registered masseuse, in the practice of his profession, use such equipment as diathermy, sine wave, ultrasonic and sinesoidal?

Section 480.01, F. S., provides, among other things, as follows:

(1) Masseur and Masseuse.—(a) For the purpose of this chapter the term masseur or masseuse shall be deemed to be a person who practices, administers or teaches all or any one or more of the following subjects and methods of treatments, viz: who administers or teaches treatments with any mechanical or electrical apparatus for the purpose of body slenderizing, body reducing or body contouring.

(b) Further a person who has studied the underlying principles of anatomy and physiology and administers or teaches all or any one or more of the following subjects and methods of treatments, viz: . . . body massage either by hand or by any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, vibration, kneading, cupping, petrassage, rubbing, affleurage, tapotement.

Considerable research has been done by this office to try to determine the nature of diathermy, sine wave, ultrasonic and sinesoidal equipment and its effect on the human body. None of the equipment is defined by statute or specifically regulated. We have therefore resorted to standard and medical dictionaries for the following definitions:

Diathermy—Literally, a heating through; specif., med., the local elevation of temperature in tissues beneath the surface of the skin, produced for therapeutic purposes by means of high-frequency electrical oscillations; also loosely the current so used, or the apparatus for applying it. (Webster's International Dictionary.)

Diathermy is heat treatment by electricity. *Biener v. St. Louis Public Service Co.*, Mo. App. 160 S. W. 2d 780, 788." (Words and Phrases.)

Sine Wave—A wave in which the vibrations of the particles of the transmitting medium are simple periodic. The graph of the wave, if plotted, would be a sine curve. (Webster's International Dictionary.)

Ultrasonic—Supersonic. (Webster's International Dictionary.)

Sinesoidal—An electric current in which the potential rises gradually from zero to a maximum, then gradually returns to zero or to a minimum, and then reversingly repeats this action. (The American Illustrated Medical Dictionary.)

In our further effort to study and properly answer your question we wrote a letter dated Sept. 19, 1957, to Dr. Homer L. Pearson, secretary-treasurer of the Florida state board of medical examiners, wherein we requested information as follows:

As you are familiar with the medical practice act and the medical functions your board licenses a doctor to perform, as well as being a practicing physician, your opinion and advice on the use of the above named equipment and its relation to treatment or effect on the human body will be a great help to me. I am especially desirous to know if you think that the use of any of the equipment could be construed to be practicing of medicine as defined by Ch. 458, F. S., or could the use of such equipment by untrained persons cause damage to an individual if such person using same did so improperly due to lack of medical training. Do you think that the effects of the equipment if improperly used could result in such serious consequences that it should only be used under the supervision of a physician?

On October 2, 1957, Dr. Pearson replied as follows:

"In reply to your question regarding diathermy, ultrasonic sine wave, and sinosoidal in the practice of massage, let me say first that there is considerable danger in their usage by those who are not fully trained. As far as their use in slenderizing and contouring the body is concerned, they have no place.

"Ultrasonic is still in the research stage and certainly should not be used by any person except under the direct supervision of a physician who has had special training in its use. It is probably the most dangerous of all the modalities and comes within the purview of practicing medicine. It has absolutely no place in the practice of massage.

"These modalities are used in some instances by the irregular and unethical practitioners for inducing abortion. Use of these modalities by those who are unqualified can result in degeneration of normal tissue and produce gangrene."

On Jan. 13, 1956, this office rendered opinion 056-12 which reads in part as follows:

In *People v. Dennis*, 271 App. Div. 526, 66 N. Y. S. 2d 912, the court, after defining the term "massage" as used in a New York statute providing for the licensing of masseurs and masseuses, seemed to be of the opinion that a person using massage in connection with some human disease, pain, injury or physical condition, would be practicing medicine within the purview of that state's medical practice act.

Under Ch. 458, F. S., relating to the practice of medicine, any person "shall be deemed to be practicing medicine within the purview of said chapter, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall offer or undertake, by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition." The said section then goes on to exempt osteopaths, chiropractors, chiroprudists, naturopaths, optometrists, nurses, pharmacists, dentists and

midwives from the statute when duly licensed under their respective statutes. It may well be that the legislature was of the opinion that the above listing would have been within the medical practice act except for the exemption.

It is evident that under Ch. 458, F. S., any attempt to treat any human disease, pain, injury or physical condition, which would embrace human disability, by any means whatsoever, which would include massage, therapeutic exercises, and the physical, chemical and other properties of heat, light, water and electricity, will constitute the practice of medicine in this state, unless exempt from the operation of the statute.

In view of the foregoing I believe that we should place emphasis on the medical opinion expressed by Dr. Pearson and hold that diathermy, ultrasonic, sine wave and sinesoidal equipment has little place, if any, in the slenderizing and contouring of the body as defined by the massage practice act (Ch. 480, F. S.). It appears that the use of such equipment is more designed or intended for treating and remedying human ills by persons trained and qualified to use same for such purposes.

Accordingly your question is answered in the negative.

057-337—October 29, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—CONTINUOUS UNBROKEN SERVICE
AS USED IN §122.09, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is there a breach of the "continuous unbroken service" required by §122.09, F. S., when a state or county employee applies for and is granted and accepts a leave of absence from public employment on account of illness, pregnancy or for purposes of further education, and returns to his or her said employment promptly upon termination of such leave of absence?

Disability retirement is provided by §122.09, F. S., "whenever any officer or employee of the state or county of the state has service credit as such officer or employee for ten years within the contemplation of this law, the last five years of which *must be continuous unbroken service*, and who is regularly contributing to the state and county officers and employees retirement fund, and shall while holding such office or employment become permanently disabled" Previous statutes, §§121.07 and 134.07, F. S., provided for disability retirement when an officer or employee had "served as such officer or employee for *ten years continuously*" The question is to be answered by determining the meaning of the phrase "*continuous unbroken service*" as used in said §122.09, F. S.

Depending upon the context and circumstances the word "continuous" has been defined as "connected, extended or prolonged without separation or interruption of sequence; constant, continual, continued, *unbroken*, unceasing, uninterrupted, unintermitted, without break, cessation or interruption, or without intervening space of time . . ." (17 C. J. S. 284; see also 13 C. J. 206; Black's Law Dictionary, 4th Ed; 9 Words and Phrases, 182 et seq.). The

"unbroken" was held to be synonymous with the term "continuous" when used in connection with adverse possession (*Panhandle and Santa Fe Railroad Co., Tex. Civ. App. 250 S. W. 246, text 248*).

General definitions seem to be of little assistance in construing the above phrase "continuous unbroken service." *Restaino v. Board of Comm., Ct. Ct. N.J., 198 A. 765*, involved a pension statute for the city of Newark which provided a pension for employees "who had been continuously in the employ of the city for a period of twenty-five years" It was contended by the city that the continuity of the employee's employment had been interrupted by seasonal slack periods, weather conditions, and other nonworking periods occurring without his fault. The court held that notwithstanding such interruptions of the continuity of the employee's labors that his employment had been "continuous and uninterrupted," within the intention and purview of the said statute. In *Kennedy v. Westinghouse, 16 N. J. 280, 108 A. 2d 1025, text 1033*, the court remarked that "'continuous' service does not contemplate the performance of labor every scheduled shift hour of every work day. In the very nature of things 'there is really no such thing as continuous labor. Holidays, sickness, recreation periods, weekends, all are breaks in the continuity of one's occupation, but would not necessarily destroy its continuity.'" In *Garnsky v. Metropolitan Life Ins. Co., Wis., 287 N. W. 731, 124 A. L. R. 1489*, it was held that the continuity of employment, within the provision of a group insurance policy requiring as a condition of disability benefits that claimant shall have been continuously employed for two full years, was not interrupted by a layoff of approximately six months, the employer at the commencement of that period having been issued a "quit slip" stating that the employee was "leaving company service" because it was reducing its force, and entered upon his insurance card a notation of cancellation, a new employment card having been filled out when he returned, and a different clock number given him, and he having applied for and received a new policy three months after his return, especially as the use of the word "employment" was avoided and the terms "continuous service for three months" and "actively at work" were substituted in the provision prescribing the conditions of eligibility of employees for group insurance.

Under federal regulations, concerning world war I war risk insurance, an insured was deemed to have overcome a permanent disability when able to "continuously" follow a gainful occupation. In *Ford v. U. S., CCA 1st., 44 Fed. 2d 754, text 755*, it was held that periods of disability "such as are ordinarily incident to the activities of people in generally sound health" do not break the continuity contemplated by the term "continuously." The term "continuously" has been construed to mean with reasonable regularity. In *U. S. v. Pullig, CCA 8th., 63 Fed. 2d 379, text 383*, in the same connection, it was held that the term "continuously" "does not mean every day or some definite fixed period, as a year or a month, but rather means a substantial portion of time, and if a party can pursue a gainful occupation for a substantial period of time, as compared with the labor and intensity of the work of others in similar lines" his labors may be said to

be continuous. "Work does not cease to be *continuous* because of interruptions in one's occupation due to mere periods of temporary illness, such as are ordinarily incident to people of normal health" (Ellis v. U. S., CCA 10th, 59 Fed. 2d 729, text 729; see also U. S. v. Fitzpatrick, CCA, 10th, 62 Fed. 2d 562, text 564). In U. S. v. Perry, CCA 8th, 55 Fed. 2d 819, text 821, it is stated that the word "continuously" as used in the regulation "surely does not mean every day or some definite fixed period . . . but rather means a substantial portion of time, and, if a party can pursue a gainful occupation for a substantial portion of time as compared with labor and intensity of work of others in similar lines, he is not totally disabled. There is no such thing as continuous labor. Holidays, sickness, recreation periods, weekends, all are breaks in the continuity of one's occupation, but would not necessarily destroy its continuity.

Accident and similar insurance policies often include elements of continuity and undertake to insure only for loss resulting from injuries that wholly and continuously disable the insured. In Jacobson v. Mutual Benefit Health and Accident Ass'n, N. D., 296 N. W. 545, text 553, the court, in a policy of this nature, held that the "word 'continuously' means regularly, protracted, enduring and without any substantial interruption of sequence, as contradistinguished from irregularly, spasmodically, intermittently or occasionally. *Continuously* does not necessarily mean constantly . . . nor does it denote ceaseless or absolute continuity . . ." In Romig v. Champion Blower and Forge Co., 315 Pa. 97, 172 A. 293, text 295, an employer had reduced temporarily the working time of his plant from five and one-half days per week to two days per week. A regular employee working only two days per week under the said reduced working time plan was nevertheless held to be continuously employed within the intent and purpose of the Pennsylvania workmen's compensation statutes notwithstanding the said reduction in general working time.

We are of the opinion that the above authorities justify a construction of the phrase "continuous unbroken service," as used in §122.09, F. S., as excluding nonworking days, such as Sundays, holidays, temporary illnesses, vacation periods and work stoppages and interruptions of a temporary nature when beyond the control of the employee. The failure of state and county employees to perform services during nonworking days, temporary illnesses, vacation periods and work stoppages and interruptions of a temporary nature would not break the continuity of services required by §122.09, F. S., and there will be the "continuous unbroken service" required by the statute.

It is a recognized practice in government and business that employees may be given a leave of absence for reasons which the employing head may deem just and proper and at the end of said leave the employee may return to his or her former employment with the same seniority and benefits that he or she had at the time the leave of absence was granted. This has been the practice for many years in our state government and it has been accepted without question that an elected official or an appointed agency head may at his discretion, grant a leave of absence to an employee of such official or agency for cause said official or agency head may deem proper. However, leave should only be granted for a time that may be justified by the purpose therefor

and in no instance should such leave extend beyond the term of office of the elected or appointed official, or the terms of the majority of the members, in the case of a commission or board, under whose authority such leave is granted. Provided further all applicable limitations of merit or other similar type employment systems should not be violated.

Accordingly, it is my opinion that it is not a breach of the "continuous unbroken service" required by §122.09, F. S., when a state or county employee applies for, is granted and accepts a leave of absence. However, such leave of absence should be in writing and duly approved by the official authorized to grant same and a signed copy should be sent to the state comptroller for his records at the time the leave is granted. If the employee returns to his or her employment promptly at the termination of such leave of absence he or she should be considered in the same seniority status as of the date such leave was granted. The time that the employee is on leave of absence shall not be computed in the total of the employee's length of service for any purpose and the leave shall serve only for the purpose of preserving all rights including the retirement privileges which had accrued to the employee at the time the leave was granted. Your question therefore is answered in the negative with such future requirements as are set out with reference to registering leaves of absence with the comptroller.

057-338—October 31, 1957

MOTOR VEHICLES

TITLE CERTIFICATES—AUTOMOBILE DEALERS—ALTERNATIVE METHOD OF REGISTRATION—CONSTRUCTION OF §§319.21 AND 320.13, F. S.

To: *Ina S. Thompson, Motor Vehicle Commissioner, Tallahassee*

QUESTIONS:

1. May the commissioner register a motor vehicle in the name of a dealer, as provided for in the second paragraph of §320.13, F. S., without requiring the dealer to submit an application for a certificate of title in his name, upon each vehicle so registered?

2. Upon registration of a motor vehicle in the name of a dealer, as provided for in the second paragraph of §320.13, do the provisions of Ch. 57-398 require the dealer to submit a statement in regard to the sales or use tax upon the vehicle being so registered?

AS TO QUESTION 1:

The 2nd paragraph of §320.13, F. S., provides an alternative method of registration by automobile dealers in the following language:

When a dealer in motor vehicles shall choose to register any motor vehicle he has for sale and secure a regular motor vehicle license tag therefor, he may, upon sale thereof, have the registration and license tag issued for such motor vehicle transferred to the purchaser by making application to the state motor vehicle commissioner and remitting twenty-five cents for each such transfer.

You will note that the above language makes no reference to the title certificate requirement. It is necessary, therefore, to refer to §319.21, F. S., which creates such requirement. Where applicable, this section provides exceptions to the title certificate requirement in the following language:

... provided that any dealer holding *current dealer license plates* issued by this state may, in lieu of having a certificate of title issued in the name of such dealer, reassign any existing certificate of title issued in this state or, if no certificate of title exists on such motor vehicles in this state, such dealer shall, over his signature, briefly note such fact of nonexistence and show the name and address of the party from whom the vehicle was obtained, on the face of the separate application for initial certificate of title which is made by the purchaser or transferee. (Emphasis supplied.)

The foregoing quoted language appears to relate to used motor vehicles, or vehicles which have had a previous certificate of title issued either in this state or in another state, and provides that in such cases any dealer *holding current dealer license plates* need not have a certificate of title issued in his name on such vehicle.

Continuing with the above quoted language of §319.21 is the following:

It shall not be necessary for any licensed automobile dealer in Florida to obtain a certificate of title on any *new motor vehicle* which he is selling but such dealer shall, over his signature, certify on the face of the separate application for initial certificate of title which is made by the purchaser that said motor vehicle is a new motor vehicle and shall also disclose the name and address of the manufacturer, distributor, or other person from whom he acquired said new motor vehicle. . . ." (Emphasis supplied.)

The foregoing language manifestly deals with the sale of new motor vehicles and does not contain the qualification of the previously quoted portion of §319.21, F. S., that he be a dealer "holding current dealer license plates."

In summary, as to question 1, it is my opinion that the choice provided by the 2nd paragraph of §320.13, F. S., is applicable to the sale of both new and used automobiles, but that the effect on the certificate of title requirement is not the same. As to a new car, the dealer need not have a title issued under his name, but as to a used car this requirement attaches when the dealer avails himself of the alternative method provided in §320.13, F. S.

AS TO QUESTION 2:

Chapter 57-398, as amended by senate bill 52 of the 1957 extraordinary session, amends certain sections of Ch. 212, F. S., relating to sales and use taxes, and, where applicable, provides:

No title certificate shall be issued by the motor vehicle commissioner on any motor vehicle unless there be filed with such application for title certificate a receipt issued by an authorized motor vehicle dealer or by the comptroller evidencing the payment of such tax *where the same is payable*. (Emphasis supplied.)

A vehicle which is registered by a dealer under the alternate method of §320.13 is one which has not been sold or put into use within the contemplation of Ch. 212, relating to the imposition of sales and use taxes, therefore it is not subject to the statement required in the above quoted provision. The requirement of a statement or receipt of taxes paid is only applicable where the sales or use tax "is payable." However, when requesting a title certificate the dealer should furnish the commissioner with a statement that the vehicle has not been sold or put into use, if such be the case.

Your questions are answered accordingly.

057-339—November 1, 1957

INSURANCE

LIFE INSURANCE—PROPRIETY OF ISSUANCE OF WHOLESALE INSURANCE TO MEDICAL ASSOCIATIONS—

§§635.02, 635.03, 635.05, 635.24, 635.25, 642.04-642.06
AND CH. 646, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Are certain policy forms proposed to be issued by a life insurance company to members of a Florida county medical association and providing wholesale insurance coverage of the members thereof, authorized under the laws of this state?

The plan involves wholesale insurance on the lives of members of a county medical society. It has been under consideration by your department for several months. Certain suggestions by members of your department concerning the plan, acceded to by the company, result in fair and unambiguous coverage but for the possible objections mentioned below.

On May 10, 1930, the then Attorney General Davis issued his opinion (1929-1930 B. R., 243) to the effect that §6225, C. G. L., prohibiting distinction or discrimination between insureds of the same class and equal expectation of life, and permitting issuance of group coverage, as specified, did not preclude issuance of wholesale insurance. The provision in said section relating to group coverage is quoted:

Nothing in this section shall be construed to prohibit . . . any life insurance company doing business in this state from issuing policies of life endowment insurance with or without annuities at rates less than the usual rates of premiums for such policies insuring employees of any employer who through their secretary or employer take out insurance in groups of not less than fifty persons and pay their premiums through such secretary or employer.

Attorney General Davis in the aforesaid opinion distinguished between "wholesale insurance" and "group insurance"; cautioned that the "plan providing for this wholesale insurance must be such a plan that all individuals who comply with the standard necessary to obtain this so-called 'wholesale insurance' will be able to do so . . . if wholesale insurance is issued to groups of ten persons it must be available to any group of ten persons

having a like relation in order to avoid discrimination between individuals."

The part of §6225, C. G. L., relating to discrimination, above mentioned, is now carried in our statutes as §635.02; and further provisions of said former section are now set forth in §635.03. Since the adoption of Ch. 25189, 1949 (see §§635.24 and 635.25, F. S.) we have permitted group life coverage which has followed in principle the 1948 group definition of N. A. I. C., which states that "no policy of group life insurance shall be delivered except to—1. Employer-employee groups, 2. Debtors of one lender, 3. Labor union groups, 4. Trusteeship cases." In this connection attention is also directed to Ch. 646, F. S., relating to credit life, accident and health insurance. Also I think that it is here relevant to refer to group accident and sickness insurance, industrial sickness and accident insurance, and blanket sickness and accident insurance (§§642.04, 642.05 and 642.06, F. S.). With these provisions in mind, let's refer to the wording in §635.02, F. S., which begins, "No life insurer doing business in this state shall make or permit any distinction or discrimination between insureds of the same class, etc." And also refer to the provisions of §635.05 to the effect that nothing in §635.02 shall be construed as prohibiting, among other described types of insurance, specified group coverage; and §§635.24 and 635.25 are to be read in *pari materia* with the provisions of §635.05.

So with respect to the prohibition against discrimination set forth in §635.02 we have specified and distinct exceptions, including group life coverage. Also, the provisions under Ch. 642 relating to group, industrial and blanket coverage point out with certainty the application thereof. In none of these laws is there found an exception or provision permitting "wholesale insurance."

Technically there is a distinction between "group" and "wholesale" life coverage; and while you are well familiar with the difference, for the benefit of others who might read this, the following is quoted from the first headnote in *Prudential Insurance Co. v. Jenkins*, Ky., 162 S. W. 2d 791:

"Wholesale insurance" is issued to a group of not less than ten nor more than 49 employees of a single company. Individual policies are issued to each employee and applications are required both from the employer and each member of the group. The principal difference between "wholesale insurance" and "group insurance" is that the latter type requires 50 or more employees who are not required to make individual applications and receive certificates referring to a master policy which is issued to the employer.

You will recall our opinion 056-16 (1955-56 B. R., 474) dealing with an employee protection plan issued on a wholesale basis. The following is quoted therefrom:

... It apparently is a type of wholesale (employee) insurance. A general description of this latter type of insurance is quoted from *Guide to Life Insurance*, Osler and Robinson, 2d Ed. p. 80: "Where the number of employees is too small to come within the legal definition of a group, wholesale insurance is written. *This insurance*

is similar in principle to group except that individual policies (usually one-year term) are issued, a health history and statement are taken, and a medical may be required." Within certain limits this type of insurance may be issued in this state. . . . (Emphasis supplied.)

You will recall we disapproved the plan dealt with in that opinion because of provisions similar to those required in group coverage.

The following is quoted from the 5th headnote of *Travelers Ins. Co. v. Harrison*, 44 S. E. 2d 457: "'Group insurance' is not the same type or form of insurance as 'wholesale insurance.'" This statement in the text of the case is premised upon "44 C. J. S. Insurance, Section 15, N. 81." Reference is also made to *Wholesale Insurance, Words & Phrases*. When these are all run down, statements derive from this Georgia case and the above case from Kentucky.

From these cases and from *Guide to Life Insurance*, above mentioned, the examples involve the employer-employee relationship in some form or other.

This proposed wholesale insurance for the Dade county medical society involves a homogeneous group. Just what kind of group was involved in former Attorney General Davis' opinion is not apparent. And what did he mean by the words, "if wholesale insurance is issued to groups of ten persons it must be available to any group of ten persons having a like relation in order to avoid discrimination between individuals"? What kind of groups would be involved? In absence of statutory limitations, who is to prescribe conditions relating to such "groups"? Furthermore, while technically "group" and "wholesale" insurance are to be distinguished, as stated in above *Guide to Life Insurance*, the latter "is similar in principle" to the former.

In view of the foregoing, in my opinion the question is answered as follows:

Such reasonable doubt exists concerning the propriety of the issuance of wholesale insurance coverage to the members of the mentioned medical association that in absence of a court construction to the contrary, I must here assume the position that the policy forms providing such coverage are not authorized under our laws. As stated in an early part of this opinion, but for the technical objections urged herein, it appears that the coverage if issued would be fair and unambiguous. Hence, if interested parties desire to test the propriety of these policy forms, which would furnish the coverage mentioned, in declaratory judgment proceedings, I would be glad to cooperate and to expedite any such proceedings.

057-340—November 4, 1957

STATE OFFICERS AND EMPLOYEES

RESIDENCE—CONSTRUCTION OF §112.02, F. S.—§192.13, F. S.
AND §7, ART. X, STATE CONST.

To: Board of County Commissioners, Sarasota

QUESTION:

Does the phrase, "bona fide residents of this state for two years next prior to such employment," as used in

§112.02, F. S., require that one actually remain within the confines of the state, without going beyond its borders, for said two-year period?

Section 7, Art. X, State Const., requires that the owner of real property, in order to be entitled to homestead tax exemption, "reside thereon and in good faith make the same his or her permanent home"; §192.13, F. S., provides that this requirement does not mean "continuous physical residence on the property." The court has also held that temporary absence from the property will not defeat the homestead right (*L'Engle v. Forbes*, Fla., 81 So. 2d 214; *City of Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529). A temporary absence from a homestead under the circumstances mentioned in the request for opinion would not usually be held to constitute an abandonment of a homestead as against a judgment creditor (40 C. J. S. 644, §166); nor would it usually be held an abandonment of voting rights (29 C. J. S. 43, §43). Other authorities might be cited along the same line.

The above question is, therefore, answered in the negative. We feel that the absence set out and explained in the request for opinion shows a two-year residence within the purview of the said §112.02, F. S.

057-341—November 6, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
MOTOR VEHICLE SALES FINANCE COMPANY—LICENSE
REQUIRED—CH. 57-799 (Ch. 520, F. S.)**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where an applicant for a license under Ch. 57-799, the motor vehicle sales finance law, has branch stores located in two or more places in Florida, but the accounting and financing for the branches is done at the main store in Florida, does the law require a license of \$25 for the principal place of business and \$25 for each branch of the licensee?

Chapter 57-799, Section 1(i), defines a "sales finance company" to include "a retail seller engaged, in whole or in part, in the business of creating and holding retail installments contracts." Section 2(c) provides for a license fee of "twenty-five dollars for the principal place of business of the licensee and the sum of twenty-five dollars for each branch of the licensee maintained in this state." Section 2(d) provides that "Each license shall specify the location of the office or branch and must be conspicuously displayed there."

The chapter clearly contemplates that in the normal course of affairs there shall be a license and a fee paid for each place of business, either principal or branch, in which the motor vehicle sales finance business is transacted. The fact of central accounting and financing does not render any branch any the less a place of business within the purview of the license requirement so long as any part of the sales finance business is transacted there.

In *Goldstein v. State Revenue Commission*, 178 S. E. 164 (Ga. App. 1934), a somewhat analogous situation was litigated. The Georgia statutes levied a license fee upon all persons engaged in the dry cleaning business "a sum of \$25 for each place of business." The defendant had one dry cleaning plant and several places in the city where he received clothes for dry cleaning. The court held that each place of receiving clothes was a "place of business" within the statute although the actual dry cleaning was done elsewhere.

The purpose of Ch. 57-799 is not primarily to collect a tax but to regulate the business of motor vehicle sales financing. A buyer who signs an installment contract at a branch office is in need of as much protection as one who signs a contract at the principal office, and a branch office is no less under the restrictions of the chapter because the financing and accounting for the installment contract is done at the principal office.

Accordingly, it is my opinion that central accounting and financing do not exempt a branch office from the license requirement of Ch. 57-799. The above question is answered in the affirmative.

057-342—November 7, 1957

STATE OFFICERS AND EMPLOYEES

EMPLOYMENT BY THE MONTH—COMPENSATION FOR EMPLOYMENT OF LESS THAN MONTH

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

How should the compensation of a state employee be calculated, when the employment is by the month and compensation is fixed on a monthly basis, where the employee's employment is terminated during the month?

Many state employees have been employed on a monthly basis and are being paid a fixed amount per month of employment whether the month be one of 28, 29, 30 or 31 days. It is here apparent that the average daily compensation for the entire month varies with the number of days in the month. The general rule seems to be that where employment is terminated before the end of the month, where the employment is by the month, that the employee is entitled to compensation "for the actual time during which services were rendered at the contract rate" (56 C. J. S. 555, §113).

Unless the employment for a fraction of a month, where the employment is on a month to month basis, is compensated for the actual days worked and on the ratio of such number of days employed to the actual number of days in that month, there would be an inequity, either against the employer or the employee during some of the months. To use a 30-day month in making all such calculations, instead of the actual number of days in that month, the employer would be favored in some cases and the employee in others. Only when the actual number of days in the month is used as the denominator of the fraction used to determine the compensation for a part of a month will we arrive at the correct amount due, and at an amount equitable to both the employer and employee.

These observations seem to answer the above stated question.

057-343—November 8, 1957

CIVIL PRACTICE AND PROCEDURE

VALIDATION OF BONDS—CONSTRUCTION OF §75.11, F. S.,
AS AMENDED BY CH. 57-300—CH. 75 AND §75.02, F. S.

To: J. Turner Butler, Jacksonville

QUESTION:

Do the provisions of §75.11, F. S., as amended by Ch. 57-300, apply to state agencies, such as the Florida development commission, in so far as it dispenses with the certificate of the clerk of the circuit court as was required prior to said amendment?

Section 75.11, F. S., as amended by Ch. 57-300, provides as follows:

Bonds or certificates, when *validated* under the provisions of this chapter, shall have stamped or written thereon, by the proper officers of such county, municipality or district issuing the same, a statement in substantially the following form: "This bond is one of a series of bonds which were validated and confirmed by decree of the Circuit Court of the . . . Judicial Circuit of the State of Florida, in and for . . . County, rendered on 19

A copy of such decree, certified by the clerk of the circuit court in which the decree was rendered, shall be original evidence of such decree in any court in this state. (Emphasis supplied.)

But prior to said 1957 amendment the said section provided as follows:

Bonds or certificates, when *issued* under the provisions of this chapter, shall have stamped or written thereon, by the proper officers of such county, municipality or district issuing the same, the following: "Validated and confirmed by decree of the circuit court (specifying the date when such decree was rendered and the court in which it was rendered)," which shall be *signed* by the clerk of the circuit court in which the decree was rendered, which entry shall be original evidence of said decree in any court of this state. (Emphasis supplied.)

The said section prior to and after amendment is substantially identical through the form of the certificate to be written or stamped on the bonds or certificates issued; however, the sections differ materially after the said form of certificate. The original section requires that the certificate to be stamped or written on the bond or certificate "be *signed* by the clerk of the circuit court in which the decree was rendered, which entry (evidently the signed certificate) shall be original evidence of said decree in any court of this state." The amendment appears to have *dropped* this language and substituted in lieu thereof the provision that "a copy of such decree, certified by the clerk of the circuit court in which the decree was rendered, shall be original evidence in any court of this state."

"Where there is an amendment to a section of a statute, the amendatory section takes the place of the section amended as a part of the original act. See *Stokes v. Galloway*, 61 Fla. 437, 54 So.

799; *Saunders v. Provisional Municipality of Pensacola*, 24 Fla. 226, 4 So. 801. When a section is amended by an enactment by stating it 'shall read as follows,' the amendment desired then follows, then the substituted amendment becomes for all purposes in the future the section of the original act. See *Basnett v. Jacksonville*, 19 Fla. 664, *Atlantic Coast Line R. Co. v. Amos*, 94 Fla. 588, 115 So. 315." (*Miami Bridge Co. v. Railroad Commission*, 155 Fla. 366, 20 So. 2d 356, text 359). Strictly speaking, an amendatory act is not regarded as an independent statute. Of course, the statute in its old form is superseded by the statute in its amended form, the amended section of the statute taking the place of the original section, for all intents and purposes as if the amendment had always been there." (50 Am. Jur. 481-2, §468). "An amendatory act which provides that the original statute shall be amended 'so as to read as follows' or otherwise purports, or is required by constitutional provision, to set out in full all that the statute as amended is intended to contain, becomes a substitute for the original . . ." (82 C. J. S. 503, §294). We must, therefore, conclude that the provision in §75.11, F. S., for the signing of the certificate therein mentioned by the clerk of the circuit court has been completely eliminated so that such a certificate signed by a clerk where the validation proceedings were commenced, and evidently also where completed, after the effective date of said Ch. 57-300, will not be original evidence in the courts of this state of the validation decree, such evidence must now be given by a certified copy of the decree itself. The certificate itself is no longer "original evidence" but merely information.

Section 75.02, F. S., 1941, provided that "any county, municipality, taxing district or other political district or subdivision of this state, including the governing body of any district established for the purpose of drainage, conservation or reclamation, may, . . ." bring proceedings in the circuit court to validate its bonds, certificates, etc. This section was amended by Ch. 25263, 1949, so as to add to the above list "state agencies, commissions and departments authorized by law to issue bonds . . ." However, we find no amendment of §75.11 prior to above mentioned Ch. 57-300. The reference in said §75.11, even after the amendment by Ch. 57-300, has remained to "the proper officers of such county, municipality or district issuing the same . . ." When said §75.02 was amended in 1949, so as to authorize validation proceedings by "state agencies, commissions and departments," in addition to counties, taxing districts, municipalities, etc., without any comparable amendment of §75.11, doubtless the legislature intended that the provisions of §75.11 be applicable to validation proceedings by "state agencies, commissions and departments," and we are informed that such §75.11 was, prior to its 1957 amendment, followed in such validation proceedings. We, therefore, feel that the legislature, even when the 1957 amendment was made, intended said §75.11 as amended continue to be used in connection with validation proceedings by state agencies, commissions and departments.

Although we feel that the above stated question should be and it is here answered in the affirmative, we make a general recommendation to any state agencies, commissions or departments bringing validation proceedings under Ch. 75, F. S., that they make an issue of such question in such validation proceedings so that the question may be settled by the courts.

057-344—November 8, 1957

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—HOSPITAL DISTRICTS—FORMER CHS. 121
AND 134, F. S.—OPINION 055-178 AND CIRCUIT COURT
DECREE DATED 3/9/57—CH. 122, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Were the officers and employees of the South Broward hospital district and of the North Broward hospital district, in Broward county, within the purview of either Ch. 121 or Ch. 134, F. S., prior to consolidation into Ch. 122, F. S., in the light of the circuit court's decree of March 9, 1957?

The circuit court of the 2nd judicial circuit, in and for Leon county, by decree made and entered on March 9, 1957, held that the South Broward hospital district and the North Broward hospital district, each existing under and by virtue of local acts of the legislature, were not within the purview of Ch. 122, F. S., formerly Ch. 29801, 1955.

Reference to said Ch. 29801 reveals that it was designed and intended to consolidate Chs. 121 and 134, F. S., into a single retirement system. The definitions of state and county officers and employees as used in Ch. 122, and of state officers and employees as used in Ch. 121, and of county officers and employees, are so nearly identical as to clearly show an intention on the part of the legislature to include in the state and county officers and employees retirement system (Ch. 122, F. S.) those officers and employees previously included in the state (Ch. 121, F. S.,) and the county (Ch. 134, F. S.,) officers and employees retirement systems. It, therefore, follows that if not included under the compulsory provisions of Ch. 122, F. S., the hospital districts were not included under the compulsory provisions of Chs. 121 and 134, F. S.

The above question is, in the light of the said decree of March 9, 1957, answered in the negative.

057-345—November 8, 1957

TAXATION

**EXCISE TAX ON DOCUMENTS—SALES OR PURCHASE
TICKET—WRITTEN OBLIGATION TO PAY—LIMITED SIG-
NATURE—§§201.01 AND 201.08, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a written sales or purchase ticket, showing payments made and to be made, is sufficient in form to constitute "a written obligation to pay money" and is signed by the purchaser, what effect, if any, does the notation that "my signature does in no way constitute a promise to pay in any form" have upon the said instrument?

The instrument in question appears to contain information concerning the applicant as a credit risk, also a description of the goods, wares or merchandise purchased, the amount of the down

payment made or to be made and the monthly or other payments to be made and the dates to be paid. However, the signature of the purchaser or obligor is limited by the phrase "I hereby certify that I have agreed to purchase goods described hereon, but understand my signature does in no way constitute a promise to pay in any form." We find nothing in the instrument expressly retaining title to the goods purchased until future installments are paid or in any way expressly vesting a lien in the seller.

A reading of §§201.01 and 201.08, F. S., reveals a documentary stamp tax upon all "written obligations to pay money . . . made, executed, delivered," in this state. This statute seems to contemplate an outright promise to pay money and not a contingent promise (*Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442; *De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924). Although the court may appear to have receded, in *Dundee Corp. v. Lee*, 156 Fla. 699, 24 So. 2d 234, from the application of the rule of *ejusdem generis* in *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909 and *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, we feel that the court may have returned to the rule in *De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924, text 925. The tax under this section is on the written promise to pay (*Plymouth Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415).

The instrument before us appears to be in the form of a sales slip or memorandum, showing the name, address and telephone number of the purchaser, what amounts to credit rating information, terms of payment, description of the goods, wares or merchandise purchased. Although signed by the purchaser his signature is made conditional by reason of the following provision next above the signature of the purchaser, to wit: "I certify that I have agreed to purchase goods described herein, but understand that my signature does in no way constitute a promise to pay in any form." We gather from this quoted provision that it was intended as a receipt for the goods, wares or merchandise purchased, together with an acknowledgment of the terms of purchase, but was not intended as an actionable contract (see *Curlee Clothing Co. v. Lowery*, Tex., 275 S. W. 730, text 732; *Knapp and Spencer Co. v. Daniels*, 52 S. D. 612, 219 N. W. 925, text 929). The memorandum is unsigned as an obligation to pay that may be sued on without reference to the sale itself (see *Quint v. Kingsbury*, Mo., 289 S. W. 667, text 668; *Picard v. Beers*, 195 Mass. 419, 81 N. E. 246, text 248; *Zastrow v. Knight*, 56 S. D. 554, 229 N. W. 925, text 929). Facts appearing in an unsigned stenographic report of unsigned testimony do not constitute an actionable contract (*Cooper v. Hoeglund*, 221 Minn. 446, 22 N. W. 2d 450, text 455; *Lovel v. Squirt Bottling Co.*, 234 Minn. 333, 48 N. W. 2d 525, text 530).

In the light of the phrase "my signature does in no way constitute a promise to pay in any form," it is doubted that an action would lie on the instrument in question as a contract. Action would seem to be one based upon goods sold and delivered (Form 15 to Rule 1.8, Florida Civil Procedure), or maybe one on account. The signed sales slip or memorandum of the purchase might be used to prove the terms of the account or sale but may not be used as a contract complete within itself.

Answering the above stated question, the limitation upon the purchaser's signature, as stated in the sales or purchase ticket prevents it being a written obligation to pay money within the purview of §201.08, F. S.

057-346—November 8, 1957

TAXATION

AUTHORITY OF COMPTROLLER TO AUTHORIZE REDUCTION IN VALUATION FOR COUNTY TAX PURPOSES—

§§192.21, 192.31, 193.12, 193.25, 200.10 AND 200.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Should it be admitted that property subject to county ad valorem taxation, not returned for taxation by its owner, has been assessed in excess of its full cash value and the time for equalization of valuations has expired, does the state comptroller have any jurisdiction and authority to authorize a reduction in such valuation?

Under §192.31, F. S., the state comptroller is given "general supervision of the assessment and valuation of property, under the supervision of the state budget commission, so that all property will be placed on the tax rolls and the valuation thereof will be uniform and equal, as required by the constitution, and he shall also have supervision over the collection of such taxes," which standards are to be exercised by the state comptroller by and through rules and regulations promulgated and adopted with the cooperation of the state budget commission. We find nothing in this section giving the state comptroller any authority to substitute his judgment, as to valuations of taxable property, for and in lieu of that of the tax assessor. (See *Root v. Wood*, 155 Fla. 613, 21 So. 2d 133, text 135-6).

The remedy of a taxpayer, should his taxable property be over-assessed as to value, is to appeal to the county tax equalization board (§§193.25, 200.10 and 200.11, F. S.). Equalization meetings are usually held in either July or August of the tax year, and we must presume that the equalization meeting in Baker county has heretofore been held. "The county commissioners have no general power in making tax assessments, but only such special and limited power as is specifically conferred by statute to secure equalization of tax values. When that power, as specially conferred, is exercised, and final adjournment is taken, their special power as a board of equalization ceases" (see *Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41; see also *State v. Thursby*, 104 Fla. 103, 139 So. 372, text 376). "Section 193.12, F. S., makes it the duty of every person owning property subject to taxation to make a return thereof to the county tax assessor and the owner is required to give the character of the property and its true cash value and upon his failure to do so the assessment and valuation made by the assessing officer shall be deemed and held binding upon such owner or other person or corporation interested in such property, unless complaint is made of such assessment and valuation on the day set for hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county tax assessor" (see *Sanders v. State*, Fla., 46 So. 2d 491, text 494).

We are informed that an owner of real and tangible personal property in Baker county failed and neglected to return such property for the purposes of 1957 ad valorem taxation by said county. So far as we are advised the equalization board met for equalization hearings and adjourned without the said taxpayer, or any other person, objecting to the valuations made by the county tax assessor for

said year. The valuation of the real property, for tax purposes, in 1957, appears to have been about nine times the valuation for such purpose in 1956, and of the tangible personal property about 41 times that of the 1956 assessment. We are advised that the book value of the personal property in question is around \$24,000.

We must, therefore, hold that the assessments and valuations of the properties in question have, if the equalization hearing by the board of county commission has been adjourned sine die, become final and not subject to administrative change; unless there has been an error committed in the making of the assessments and valuations sufficient to bring them within the purview of §192.21, F. S., which provides in part that "no act of omission or commission on the part of any tax assessor, assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place, and when so corrected they shall be construed as valid ab initio."

The above stated question is, therefore, answered in the negative; subject, however, to the above mentioned provisions of §192.21, F. S., should there have been committed such an error as would be within the purview of said section. No action on the part of the state comptroller appears necessary for corrections of errors within the purview of said §192.21, F. S.

057-347—November 8, 1957

INSURANCE

RELEASE OF DEPOSIT OF CEDING COMPANY—REINSURANCE AGREEMENT—§§631.06-631.10, F. S., BEFORE 1957 AMENDMENT

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Under a reinsurance and assumption agreement, Peerless Insurance Co., of Keene, N. H., (referred to herein as "Peerless") assumed all liability for earned premiums and losses, other than ocean marine, of Caledonian Insurance Co., Edinborough Scotland, (referred to herein as "Caledonian" effective Dec. 31, 1956. The latter insurer heretofore deposited with the insurance commissioner \$23,000 par value U. S. treasury bonds. The depositing insurer requests the commissioner to advise steps to be taken for insurer to obtain release of such deposit; and said official has referred the matter to this office for official opinion.

The annual statement for Caledonian for the year 1956, filed in the office of the insurance commissioner, indicates total premiums collected on Florida risks during that year of approximately \$285,000, a major portion of which represented premiums for the risks of fire and extended coverage.

Effective July 1, 1957, former sections of our statutes requiring deposits (§§631.06 and 648.02) were amended. We have dealt extensively with the effect of these amendments in opinions 057-331, 057-287 and 057-218. However, since we are here dealing

with the status of a deposit of Caledonian at Dec. 31, 1956, the effective date of the mentioned reinsurance agreement, §§631.06-631.10 as they existed prior to such amendments apparently control. It will be understood that our mention of these sections shall be as they existed prior to this past July 1.

Section 631.06 required of "every fire insurance company" a \$20,000 deposit, and such was held by the insurance commissioner "exclusively and solely for the benefit of the policyholders." Section 631.10 provides that if any fire insurer shall cease to carry on business in this state, and its liabilities, whether fixed or contingent, upon its policies to persons residing in this state, shall have been satisfied or shall have terminated, such deposit or portions thereof may be returned by the insurance commissioner to the withdrawing insurer under the circumstances and upon evidence as provided in said section. There is the further provision in §631.06 that when any fire insurer shall cease to carry on business in this state, and its fixed liabilities for losses and for taxes shall have been satisfied "and the contingent liabilities under its policies shall have been assumed by another insurer doing business in this state, and such reinsuring insurer, if nonresident, deposits with the insurance commissioner bonds not less in value than those of the insurer proposing to retire," the commissioner may, under circumstances set forth, deliver to such latter insurer the bonds in his possession belonging to it.

It is recognized that the words "another insurer doing business in this state" contemplates an insurer holding a certificate of authority to engage in business in Florida. Such an insurer, domestic or foreign, must have complied with the deposit requirements of §631.06. Were it not for the words "if nonresident," a reasonable argument might be made that there is contemplated only the single deposit required of an insurer not less in amount than the deposit of the retiring insurer. However, mention of "nonresident" insurer evidences the requirement of an *additional* deposit by an assuming foreign insurer.

We turn now to the words "contingent liabilities under its policies" in the quoted part of §631.10. Section 631.09 declares a lien upon the bonds so deposited "in favor of holders of all policies of said insurer at such time, or who hold policies issued upon property in this state, shall have a lien for the amounts due them, respectively, under or in consequence of such policies, for losses, return premiums or equitable values, and shall be entitled to be paid ratably out of the proceeds of said bonds (if such proceeds be not sufficient to pay all of said policyholders)." It is recognized that §631.09 relates to the bonds in relation to policyholders upon administration of the proceeds when the depositing insurer becomes insolvent. Our court held in connection with administration of such a deposit in *Bohlinger v. Higginbotham, Fla., 70 So. 2d 911*: "Though under Section 631.09 an insurance company is required to post a bond only if . . . its business includes the sale of fire insurance, the benefit of the security deposit is given to all Florida policyholders, and is not limited to claims for loss by fire." While, of course, insolvency is not here involved, the same rule applies here.

In view of the foregoing, in my opinion the question is answered as follows:

Under the provisions of §631.10, if Caledonian is able to evidence to the insurance commissioner that all of its liabilities, fixed

or contingent, upon its policies issued to persons residing in this state, have been satisfied or have terminated, under the conditions set forth in §631.10, the insurance commissioner may return the bonds constituting such deposit to it.

If Caledonian has any such policies outstanding in this state at this time and such liabilities are less than the par value of the bonds constituting such deposits, upon proof of that fact being made to the commissioner he may deliver to Caledonian the value of said bonds in excess of the value of its fixed and contingent liabilities on its Florida policies, under the circumstances set forth in said §631.10.

If Caledonian has paid all taxes due the state and its fixed liabilities for losses under policies issued in Florida, and Peerless shall deposit with the insurance commissioner bonds of the par value of Caledonian's deposit, the insurance commissioner may deliver Caledonian's bonds to it under the circumstances set forth in said §631.10.

057-349—November 7, 1957

CORRECTIONAL SYSTEM

FLORIDA SCHOOLS FOR GIRLS—SUPERINTENDENCY—

§956.04, F. S.

To: *Arthur G. Dozier, Director, Board of Commissioners of State Institutions, Marianna*

QUESTION:

Is it legally possible for the board of commissioners of state institutions to appoint a man to the superintendency of the Florida school for girls at Forest Hill?

Section 956.04, F. S., provides that the superintendent of the Florida industrial school for girls shall be a woman. In my opinion this 1915 act would apply to any state industrial school for girls created by law in Florida. In other words, I believe that it is applicable to both the industrial school for white girls and the industrial school for negro girls.

I do not find that this law has been repealed or amended.

Your question is therefore answered in the negative.

057-350—November 12, 1957

TAXATION

TAXES ON GASOLINE AND LIKE PRODUCTS—CONSTRUCTION OF §§208.181 AND 208.186, F. S.—CH. 208, §§208.01 AND 208.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a person licensed as a retail dealer under §208.01, F. S., entitled to the evaporation and shrinkage refund provided by §§208.181 to 208.186, F. S., where his sales, although at retail, are limited to taxicab drivers or other group less than the general public?

Section 208.181, F. S., provides in part that "every person, firm or corporation licensed to sell gasoline at retail to the general public at posted retail prices, hereinafter referred to as 'retail dealers' shall be entitled to a refund of two per cent of the first

gas tax" Persons, firms and corporations are licensed to sell gasoline at retail under §208.01, F. S., which provides that "every dealer in gasoline, or other like products of petroleum, in this state, under whatever name designated, shall pay a license tax of five dollars per annum to the state." Section 208.17, F. S., defines a "dealer" as used in Ch. 208, F. S., as "any person engaged in the business of selling in this state such of the products covered by this chapter as have been divested of their interstate character" We find in the statutes of this state no provision for licensing persons, firms or corporations "to sell gasoline at retail to the general public at posted retail prices." Section 208.182, F. S., provides that "No retail dealer shall be entitled to a refund unless: (a) He is the holder of a current certificate of license as prescribed by section 208.02; (b) He is the holder of an unrevoked refund permit issued by the state comptroller." (Emphasis supplied.)

Chapter 208, F. S., is primarily a taxing statute, and secondarily a regulatory statute. Taxing statutes are construed against the government and liberally in favor of the taxpayer (*Culbreath v. Reid*, Fla., 65 So. 2d 556; *National Bank of Jacksonville v. Simpson*, Fla., 59 So. 2d 751; *Overstreet v. Ty-Tan, Inc.*, Fla., 48 So. 2d 158) and any ambiguity in such statutes must be construed in favor of the taxpayer (*Cunningham v. Stefanidi*, 144 Fla. 214, 197 So. 722; *Petropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442). Sections 208.181 to 208.186, F. S., provide gasoline tax refunds to persons "licensed to sell gasoline at retail to the general public at posted prices," not to persons selling gasoline at retail to the general public at posted prices. Sections 208.181 to 208.186 were derived from Ch. 29699, 1955, the title to which was "An Act providing for a refund to licensed retail gasoline dealers of two per cent of the first gas tax. . . ." This portion of the title seems to indicate an intention to provide a refund "to licensed retail gasoline dealers," not to persons selling gasoline to the general public at posted prices. When we construe the statute in question liberally in favor of the taxpayer and against the government, and resolve the ambiguities in favor of the taxpayer, we must hold that the refunds are to licensed retail dealers licensed under §§208.01 et seq., F. S. (Emphasis supplied.)

In the instant case the two taxicab companies were corporations under the laws of Florida; the same person owned the controlling stock in each company and controlled the operation thereof. Both companies owned taxicabs which were leased to persons for a fixed daily rental who operated them as independent contractors. The companies serviced the taxicabs and maintained them in good repair; however, the person renting them purchased gasoline for the taxicabs leased by him (*New Deal Cab Co. v. Fahs*, CCA 5th, 174 F. 2d 318; *Economy Cab Co. v. Fahs*, CCA 5th, 174 F. 2d 321). Evidently the owner of the controlling stock in each of said companies maintained two gasoline stations where the lessees of the taxicabs could purchase gasoline for their taxicabs at a reduced price. These gasoline stations were not owned by the taxicab companies but by their majority stockholder. The taxicab companies, the taxicab lessees or drivers, and the owner of the gasoline stations were separate entities. It appears from these facts that the two gasoline stations were selling gasoline at retail; not to the general public, but to a limited group.

In the light of our above construction of §§208.181 to 208.186, F. S., and the finding that the lessees are purchasers of gasoline at retail, we answer the above stated question in the affirmative.

057-351—November 12, 1957

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF LIQUID FUELS—PROSECUTION OF VIOLATORS
OF DISPLAY OF GASOLINE PRICE LAW—CH. 57-826
(§526.111, F. S.)**

To: *Ralph E. Daugherty, Assistant City Attorney, Lakeland*
QUESTION:

May a municipality prosecute violators of Ch. 57-826, in its municipal court, when such violation occurs within its municipal boundaries?

Section 1, Ch. 57-826, makes it unlawful for any person, firm or corporation to display or allow to be displayed any sign, placard or other advertisement not in conformity with the requirement of the said act. One of the requirements of this act is that no such sign, placard or other advertisement, except the price posted on the pump, may be displayed within 15 feet of the right of way of any public street, road or highway. Section 2 of the said act fixes the penalty for violating the provisions of the said act at "imprisonment in the county jail for a term of not more than thirty days or a fine not exceeding one hundred dollars or both such fine and imprisonment." In this state "any crime punishable by death or imprisonment in the state prison is a felony Every other offense is a misdemeanor." (§775.08, F. S.). Violations of said Ch. 57-826 are misdemeanors. (Emphasis supplied.)

It seems implicit from *Orr v. Quigg*, 135 Fla. 653, 185 So. 726, and authorities therein referred to, that although the municipal police officers are authorized and maybe required to enforce many state criminal statutes and laws, such laws are enforced as state and not municipal laws; this being true we doubt the authority of a municipal court to enforce the usual state criminal statute or law, such as said Ch. 57-826, unless such laws or statutes are also made municipal laws by municipal ordinance or by state statute. By reference to *Orr v. Quigg*, supra, we find that the city of Miami had adopted an ordinance adopting as municipal ordinances the misdemeanor statutes of the state.

We, therefore, hold that a municipal court may not prosecute violations of Ch. 57-826 occurring within its municipal borders unless there be a municipal ordinance, or a charter provision, similar to that involved in *Orr v. Quigg*, supra, adopting and making such violations municipal crimes also.

057-352—November 12, 1957

INSURANCE

**BAIL BONDSMEN—REGISTRATION REQUIREMENTS—
§§903.37, 903.50, 903.51 AND 901.07, F. S.**

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

When an arrest by warrant occurs in a county other than that in which the alleged offense was committed,

and the arresting sheriff, in pursuance of prescribed procedure, accepts a bail bond from the defendant returnable before the court issuing the warrant, may such bond for the defendant's release be executed by a limited surety agent qualified in the sheriff's county but not in the county wherein the warrant issued?

Among the definitions set forth in §903.37, F. S., are the following:

"Bail bondsman" shall mean a limited surety agent or a professional bail bondsman as hereinafter defined.

"Limited surety agent" shall mean any individual appointed by an insurer by power of attorney to execute or countersign bail bonds in connection with judicial proceedings and receives or is promised money or other things of value therefor.

"Professional bondsman" shall mean any person who pledges United States currency, United States postal money orders, or cashier's checks for other property as security for a bail bond in connection with a judicial proceeding and receives or is promised therefor money or other things of value.

Section 903.50, F. S., provides that, "No bail bondsman shall become a surety on an undertaking unless he has registered in the office of the sheriff and with the clerk of the circuit court in the county in which the bondsman resides and he may register in a like manner in any other county and any limited surety agent shall file a certified copy of his appointment by power of attorney from each insurer which he represents as agent with each of said officers. Registration and filing of certified copy of renewed power of attorney shall be performed annually on October 1. The clerk of the circuit court and the sheriff shall not permit the registration of a bail bondsman unless such bondsman is currently licensed by the commissioner."

Section 903.51, F. S., provides that every insurer engaged in the writing of bail bonds through limited surety agents in this state shall submit and have approved by the commissioner a sample power of attorney "which will be the only form of power of attorney it will issue to limited surety agents in Florida."

Section 901.07, F. S., provides the procedure for the granting of bail to a defendant arrested in a county under a warrant issued in another county.

In my opinion the question is answered as follows:

A limited surety agent executing a bail bond for release of a defendant, under the circumstances set forth in the question, must be qualified in the county where the bond is issued and delivered to the arresting sheriff. It is immaterial whether such limited surety agent is qualified also in the county within which the warrant issued.

The only possible exception to those conclusions would be provision in the power of attorney issued by an insurer to its limited surety agent, restricting his authority to issuance of bail bonds covering defendants in cases in the agent's own county. Since the commissioner approves the forms of power of attorney, he will be advised if any such have been approved with the mentioned limitation.

057-353—November 15, 1957

CRIMES

VIOLATION OF STATE LOTTERY LAW—"T.V. BUCKS" TELEVISION PROGRAM

To: *Emerson Allsworth, County Solicitor, Ft. Lauderdale*

QUESTION:

Would the following state of facts be violative of the laws of Florida prohibiting lotteries: Merchants in your area ban together and give pieces of paper to customers in proportion to their purchases, which pieces of paper are marked and called "T.V. Bucks." A television program is put on the air, which is in the nature of an auction, and the holders of these "T.V. Bucks" bid on the merchandise displayed on the program. The bidding is done either by telephone or by mail. The highest bidder receives a specific article that he has bid upon in exchange for the number of "T.V. Bucks" he bid. The unsuccessful bidders may use their "T.V. Bucks" to redeem merchandise at the participating stores.

As you know, a lottery contains three elements, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

It is apparent that a prize is awarded.

Equally apparent is the existence of consideration when compared with the reasoning of the Florida supreme court in the case of *Little River Theatre Corp. v. State*, 135 Fla. 854, 185 So. 855.

Even though an element of chance may be involved in determining just when a participant should stop his bidding, I think that the judgment and skill of each participant predominates over chance and that the "auction in absentia" might be likened to the "sealed bid" method in widespread use today. Consequently, I believe the terminal bid stems from skill rather than chance and, as is said in 54 C. J. S. 846-847, Lotteries, §2b(2):

"... and hence competitions in which skill or judgment is the predominant factor in determining the winner are not lotteries, ..."

It is therefore my opinion that the above plan does not contain the requisite element of chance and that such a plan, if put into operation, would not constitute a violation of the lottery laws of Florida.

057-354—November 13, 1957

CRIMES

PENALTY FOR VIOLATION OF WORTHLESS CHECK LAW—
APPLICABLE LARCENY STATUTE—§§832.05(6)(a);
811.021, F. S.To: *Richard E. Gerstein, State Attorney, Miami*

QUESTION:

What is the relation between the recently passed statute which distinguished petit from grand larceny on the basis of \$100, and §832.05(6)(a), F. S., which provides that the penalty for issuing worthless checks, etc., be punished in the same manner as the crime of larceny? The recently passed statute referred to in the above question

is Ch. 57-344, which became effective on June 6, 1957. Section 1 of said chapter amended §811.021(2), F. S., so as to make it grand larceny to steal property of the value of \$100 or more, instead of \$50 or more as provided by said subsection before said amendment. Section 2 of said chapter amended §811.021(3) so as to make it petit larceny to steal property of a value less than \$100, instead of less than \$50 as provided in said subsection before said amendment.

Section 832.05(b) (a), F. S., provides that any person violating §832.05, which deals with worthless checks, "shall be punished in the same manner as provided by law for punishment for the crime of larceny."

Section 832.05 was originally enacted as Ch. 28096, 1953, which did not refer by its title or otherwise to §811.021. The title did not even refer to larceny at all, much less to §811.021. The body of the act merely provided that the punishment should be "in the same manner as provided by law for punishment for the crime of larceny." Therefore, we believe the matter is governed by the rule laid down in 50 Am. Jur. 59, Statutes, §39, as follows:

... But when the adopting statute makes no reference to any particular statute or part of statute by its title or otherwise, but refers to the law generally which governs a particular subject, the reference in such a case includes not only the law in force at the date of the adopting act but also all subsequent laws on the particular subject referred to, so far at least as they are consistent with the adopting act

See also to the same effect 82 C. J. S. 848, Statutes, §370-a.

The provisions of Ch. 57-344 are consistent with the provisions of §832.05(6) (a). Therefore, it is my opinion that since June 6, 1957, the effective date of Ch. 57-344, the provision of §832.05(6) (a) that a person violating the provisions of §832.05 shall be punished "in the same manner as provided for by law for punishment for the crime of larceny" refers to the penalties prescribed by Ch. 57-344 and requires that they be imposed. In other words, I think that if a defendant is convicted for giving a worthless check after June 6, 1957, in violation of §832.05, he should be given the same punishment as is provided by Ch. 57-344 for grand larceny if the amount involved was \$100 or more and that he should be given the same punishment as is provided by said chapter for petit larceny if the amount involved was less than \$100.

057-355—November 13, 1957

JUDICIARY DEPARTMENT

JURORS AND JURY LISTS—SELECTING A TRIAL JURY—
§§40.36 AND 40.40, F. S.

To: J. Louie Carter, Clerk Criminal Court, West Palm Beach
QUESTION:

What are the statutory requirements for the calling of a jury to the jury box for the trial of a case?

Section 40.36, F. S., provides in pertinent part, that the judge shall draw from the jury box a sufficient number of names from which the venire may be organized. The statutes require that these names be recorded on a list, and that the list, together with the

slips containing said names be preserved by the clerk throughout the term.

Section 40.40, F. S., provides for the placing of all the names, so drawn, in a hat or box from which 18 names are drawn at random to make up the grand jury and that the remaining names shall comprise the petit jury for that term.

There is no statutory requirement to be followed in selecting a trial jury from the remaining persons who make up the petit jury. The practice followed is within the discretion of the trial judge, and there appears to be two standard practices of procedure that are followed in this state.

First, when the venire is originally drawn by the judge from the jury box, the clerk writes down each name as called, numbering them consecutively. Those prospective jurors who are subsequently not found, or who may be excused by the court, are removed from the list, and the remaining names are renumbered consecutively, as they appear. Thereafter, the clerk calls the first six-men, or twelve-men, whichever the case may be, to make up the trial jury for the first trial.

The other method in common use is that when all names ineligible for petit jury services have been deleted, the remaining names are placed in a hat or box, and the trial jury is selected therefrom at random. It might be noted that different trial judges have adopted numerous variations of these two methods.

With reference to the clerk's taking down the names of the jurors when the venire is selected, the statutes do not spell precisely that he should prepare his list simultaneously with the drawing of such names, or that the names should be listed chronologically in the order in which they were drawn. However, for all practical purposes, this is usually done by the clerk as the names are drawn by the judge, and in the presence of the judge, which is the advisable method.

057-356—November 13, 1957

CRIMES

VIOLATION OF STATE LOTTERY LAWS—BANK CONTEST

To: *John C. Wynn, Assistant State Attorney, Miami*

QUESTION:

Does the limerick completion contest conducted by banks violate state lottery laws?

The question involves a scheme promoted by a Miami bank wherein participants in said scheme are requested to compose a 5th line to a prepared 4-line limerick. It appears that a bonus prize will be awarded to the winner or winners who are customers of the bank at the time the contest closes.

The element of award by chance is completely lacking in the outlined scheme, thereby removing same from the purview of the lottery statutes.

This opinion is based upon the theory that the various entries will be judged by a disinterested agency, and the winners will be selected strictly upon the basis of merit.

057-357—November 15, 1957

REAL PROPERTY

SATISFACTIONS OF MORTGAGES—NOTATION ON RECORD OF MORTGAGE, MARGINAL SATISFACTION OF MORTGAGES—FEES, ETC., —§§28.21, 28.22, 28.24 AND 701.04, F. S.

To: *Loran L. Cook, Clerk Circuit Court, Chipley*

QUESTION:

What is the compensation of the clerk of the circuit court for making marginal notations of satisfactions on records of mortgages and attesting marginal satisfactions of mortgages?

Among the record books required to be kept by the clerk of the circuit court is a mortgage lien satisfaction book. When a satisfaction of a mortgage is filed and recorded in this record book the clerk is, by §28.22(5), F. S., required to "enter a note of satisfaction on the margin of the record of the mortgage or lien." A like requirement is made by §28.21(9), F. S., when a satisfaction of a judgment is made and recorded in the judgment assignment and satisfaction record. We find the following provision in §28.24, F. S., relating to the compensation of clerks of the circuit court, to wit: "Making marginal notation on the record of satisfaction or assignment of mortgage or judgment, each notation in excess of one, \$0.50."

Section 701.04, F. S., provides for satisfactions of mortgages and the records thereof. This section seems to provide two methods of making mortgage satisfactions matters of record. One is the recording of a properly executed and acknowledged satisfaction; the other is for the mortgagee or judgment creditor to "enter on the margin of the record of such mortgage, notice of lien or judgment, in the presence of the custodian of such record, to be attested by said custodian, satisfaction of said mortgage, notice of lien or judgment, and sign the same with his, her or their hand . . ." No mention is made in this section of the clerk's compensation for attesting this marginal satisfaction and placing the office seal on same.

The question of the amount of the clerk's fee for attesting and sealing a marginal satisfaction, as authorized under said §701.04, was considered by this office on Jan. 25, 1939 (1939-40 B. R. 27) and on March 9, 1942 (1941-2 B. R. 19-20) as being within the purview of §3084, R. G. S., 1920, under "copying any record or paper, first 100 words, \$0.25," reference was also made in said opinion of the provision in said section providing, to wit: "Seal, affixing to any paper other than those herein specifically mentioned, \$0.25." These opinions held that the clerk was entitled to a fee of 25¢ for his services in connection with marginal satisfactions. The Florida Clerk's Manual, p. 327, states the clerk's fee for attesting and sealing marginal satisfactions at 25¢.

Although the above quoted provision from §3084, R. G. S., 1920, was carried into the Florida Statutes as a part of §28.24, it appears to have been dropped out when the section was amended by Ch. 29749, 1955; however, there are other provisions in the said section fixing a fee of 25¢ for the first 100 words where copying some records is provided for and where entries are required

to be made. Under the present section, evidently because of recording by photographic process and similar processes, the fee for most recordings is now expressed at so much per page instead of 100 words as was previously. The above opinion of Jan. 25, 1939, stated that the charge of 25¢ therein mentioned for marginal satisfactions was then of long standing, going back in one county for 30 years or more as of the date of the said opinion.

The "making marginal notations on the record of satisfaction of mortgage or judgment," mentioned in §28.24, has reference to those notations provided for in §§28.21 and 28.22, above mentioned, and not to the marginal satisfactions provided for in §701.04, F. S. It seems evident from §28.24, as amended, that the clerk's fee for making the first marginal notation, or the only marginal notation, if only one is required, is included in the fee for recording the satisfaction. Only when more than one marginal notation is made is he entitled to 50¢ fee mentioned. This fee provision has no application to the marginal satisfactions mentioned in §701.04, where only one entry would seem to be possible.

We are of the opinion that, in the light of the increases made in clerk's fees since the said opinions of Jan. 25, 1939 and March 9, 1942, that the clerk's fee should be 50¢ for marginal satisfactions (to be distinguished from marginal notations) of mortgages, judgments, etc., especially where the clerk prepares the satisfaction, signs the same and places the office seal on it. The sealing of the instrument would of itself justify a 25¢ charge, the writing of the satisfaction would seem to justify an additional fee of 25¢.

It, therefore, follows that the clerk's fee for making the marginal notations of mortgage satisfactions required by §§28.21 and 28.22, above mentioned, is 50¢ for each such notation in excess of one, the fee for the first such notation is included in the fee for recording the satisfaction. For marginal satisfactions, under section 701.04, the fee should be 50¢.

057-358—November 15, 1957

OFFICES, OFFICERS AND PUBLIC RECORDS
SHERIFFS—REPORTS TO COMPTROLLER—§§116.03
AND 30.47-30.54, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Must a sheriff within the provisions of Ch. 57-368, comply with §116.03, F. S.?
2. If question 1 is answered in the affirmative, how should the filing date be handled?

AS TO QUESTION 1:

Section 116.03, F. S. provides:

Each state and county officer who receives all or any part of his compensations in fees or commissions, or other remuneration, shall keep a complete report of all fees and commissions, or other remuneration collected by him, and shall make a report to the state comptroller of all such fees and commissions, or other remuneration, annually on the 31st day of December of each and every year. Such report shall be made upon forms to be prescribed from time to time by the state comptroller, and shall show in detail

the source, character and amount of all his official expenses and the net amount that the office has paid up to the time of making such report. All officers shall make out, fill in and subscribe and properly forward to the state comptroller such reports, and to swear to the accuracy and competency of such reports (emphasis added).

Chapter 57-368, hereafter called the sheriff's budget act provides in part:

All fees, commissions and other remuneration provided by law for services other than criminal shall be charged by the said sheriff to other authorities and parties doing business with their offices, and shall be paid over to the county as provided in this section.

A sheriff who falls within the provisions of the sheriff's budget act now receives a salary in lieu of fees, commissions, and other remuneration; however, fees still come to his office which are to be remitted each month to the county. In Opinion 056-74 (A. G. O. 1955-1956, p. 551) dated March 9, 1956, I held that a sheriff who receives his compensation under a local, special or population act in lieu of the fee system, must nevertheless comply with §116.03, F. S. My reasoning in that opinion was based upon the purpose of the statute, which is to provide an accurate report of all fees collected by county officers. Since a sheriff within the sheriff's budget act will still receive fees, commissions, and other remuneration, he must comply with the provisions of §116.03, F. S.

Question 1 is answered in the affirmative.

AS TO QUESTION 2:

Section 116.03, F. S., provides that the report shall be submitted "annually on the 31st day of December of each and every year." The sheriff's budget law requires that the fees collected shall be remitted monthly to the county, as prescribed by the state auditor. This is the only date which I find would affect the report provided by §116.03, F. S. This is not a conflict for it only provides the time in which the fees are to be remitted to the county. The date provision of §116.03, F. S., therefore controls and the report should be submitted on December 31st of each year.

Question 2 is answered accordingly.

057-359—November 15, 1957

LEGAL FENCES

LEGAL POSTING—LEGAL ENCLOSURE, TRESPASSING—
§§588.011, 588.09, 588.10 AND 821.041, F. S.

To: *Henry C. Hamilton, Prosecuting Attorney, Monticello*

QUESTIONS:

1. What constitutes legal posting of unenclosed land which would legally prevent trespassing thereon?
2. What constitutes legal posting of enclosed land which would legally prevent trespassing thereon?

We refer you to previous opinions of this office numbers 050-13 and 054-61 found in the Biennial Report of the Attorney General 1949-50, p. 574, and the 1953-54 Biennial Report, p. 567, on the subject of legally enclosed land which have been rendered since the last change in the statutes dealing with this matter.

Land which is enclosed by a legal fence as defined in §588.011,

F. S., or by a body of water and which is posted in accordance with §588.10, F. S., to wit: notices at all corners, gates, and not more than 500 feet apart around the enclosure, is legally enclosed and legally posted land under §588.09, F. S. Section 821.041, F. S., states that unauthorized entry by any person upon legally enclosed and legally posted land shall be prima facie evidence of the intention of such person to commit an act of trespass.

In view of the foregoing, in my opinion your questions are answered as follows:

1. Posting is ineffective to prevent trespassing on unenclosed land.

2. Posting of notices in conformity with §588.10, F. S., is legal posting of land if said land is legally enclosed pursuant to §588.09, F. S., and will render trespassing thereon punishable.

057-360—November 15, 1957

INSURANCE

GROUP ACCIDENT AND SICKNESS EMPLOYEE WELFARE FUND—LABOR UNIONS, TITLE 29, U.S.C.A., §186(c)(5).

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Is the agreement and declaration of trust proposed to be entered into between local 1759, International Longshoremen's Ass'n, (hereinafter referred to as "union") and Crenshaw's, Inc., (hereinafter referred to as "company") establishing a trust fund for the purpose of providing welfare benefits to certain employees of the company, violative of any insurance laws of Florida?

The nature of the proposed agreement for present purposes is sufficiently described: The union and the company have in effect a collective bargaining agreement requiring certain payments to a trust fund by said company for the purpose of providing welfare benefits to described employees of the company; and the trust agreement is to accomplish such purpose. Among the comprehensive definitions, that of "employee" is mentioned: "Employee" means an hourly rated worker of the Company, whether union or nonunion member, who, from time to time, is employed by the company and is a member of the bargaining unit 'Employee' does not include any former worker who was discharged prior to making a claim for benefits." The following is quoted from detailed purposes of the trust:

To pay or provide for the payment of certain hospitalization, dismemberment, accident, sickness, medical and surgical benefits to be determined by the Trustees in their discretion for the employees of the Company and for the families of the employees, or to pay or provide for the payment of premiums on insurance policies which will furnish such benefits. Such of the foregoing benefits or additional benefits shall be provided only to the extent the Trustees in their discretion shall determine to be practicable, but no more than can be provided by the assets of the Trust that are available for those purposes. It shall be within the sole discretion of the Trustees as to whether to provide the foregoing benefits directly or

to purchase insurance to provide such benefits, or a combination of the two.

Among other things, there is the following provision: "The company shall not be required at any time to make any contributions to the Trust Fund nor shall this Trust become effective until the Company shall have received from the Commissioner of Insurance or the Attorney General of the State of Florida a currently effective ruling or rulings, satisfactory to the Company, that this Trust, Trust Fund, and the Company are not insurers under the applicable Florida Statutes.

It is assumed that we have here employer-employee relations under the jurisdiction of national labor relations statutes. It appears that the welfare fund sought to be established by the agreement derives in pursuance of a collective bargaining agreement and contributions by the employer company in pursuance of and as required by such agreements. Subject to the further comments below we assume that there is here involved a trust or welfare fund within the contemplation of title 29, U.S.C.A., §186-(c) (5).

The trustees are empowered to provide the described benefits for such employees and their families directly from the trust fund or to purchase insurance "to provide such benefits or a combination of the two."

In view of the foregoing, in my opinion the question is answered as follows:

To the extent that the trustees under the agreement provide the mentioned benefits by the purchase of insurance, the question is answered by the legal authorities and conclusions set forth in opinion 055-145 (1955-1956 B. R., 190).

Under the reasoning set forth in such opinion, reasonably it appears that payment of benefits directly from the fund is authorized by the mentioned federal statute; and such procedure would not constitute "this Trust, Trust Fund, and the Company . . . insurers under the applicable Florida Statutes."

057-361—November 18, 1957

LABOR

MEDIATION AND CONCILIATION SERVICE—NOTICES OF DISPUTE—CONSTRUCTION OF §448.06(4), F. S.

To: *Clyde M. Mills, Director, Florida Mediation and Conciliation Service, Tallahassee*

QUESTION:

Are notices of dispute which are filed with the Florida mediation and conciliation service in accordance with the requirements of the national labor relations act within the meaning of privileged matter contemplated by §4 of Ch. 57-306, (§448.06(4), F. S.)?

Chapter 57-306, laws of Florida, (§448.06, F. S.), created a *voluntary* mediation and conciliation service, the object of which is "the prevention and amicable settlement of labor problems." It was designed to provide a state mediation service to either work alone or in conjunction with the national labor-management relations act, 1947 (29 U.S.C.A. §§141 et seq). The state act is predicated upon the principle that the federal act recognizes and sanctions co-

operation with state and local mediation services. The state law must not, however, be inconsistent with the provisions of the federal act (*State ex rel State Board of Mediation v. Pigg*, 1951, 244 S.W. 2d 75, 362 Mo. 798). Both acts deal with an area that is evidently capable of harmonious concurrent and coordinate jurisdiction. Indeed, the labor-management relations act itself admonishes the federal service "to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties." (29 U.S.C.A. §173). In the same regard the federal act, in §10 (a) thereof, provides that the national labor relations board may cede jurisdiction to a state agency if the state agency conforms to national policy, and the state statute creating such agency has not received a construction which is inconsistent with the provisions of the federal act (29 U.S.C.A. §160(a)).

Applicable to the question presented herein is the provision of the federal act to the effect that one of the conditions precedent to the termination or modification of a collective bargaining contract is that the party desiring such termination or modification:

Notifies the Federal Mediation and Conciliation Service within 30 days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time (29 U.S.C.A. §158(d)(3)).

Although the regulations adopted by the national labor relations board provide that "all files, reports, letters, memoranda, minutes, documents or other papers" relating to activities of the labor-management relations act shall be privileged or confidential, notices of dispute are exempted from such classification, and are made available to interested parties (29 C.F.R. §§1401.1, et seq.). Since jurisdiction of the national or state mediation service is predicated upon the required notice of dispute, this exemption is necessary, otherwise one of the parties to a dispute would have to assume, without definite proof, that the other party properly filed the required notice.

The provision of the state act which is applicable to the question presented herein is §4 thereof, and reads as follows:

No employee of the mediation and conciliation service, or any other person authorized by the Governor to engage in the performance of duties prescribed by this Act, shall be compelled to disclose to any administrative or judicial tribunal any information relating to or acquired from private employers, employees, or their representatives *in the course of official conciliation and mediation activities* under the provisions of this Act, nor shall any reports, minutes, written communications or other documents or copies of documents, and the above-named employees pertaining to such private information be subject to subpoena; and all reports, minutes, written communications, oral conversations, other documents or copies of documents, and the above-named employees, and any other *information obtained directly or indirectly in the performance of this service of mediation or conciliation* shall be deemed privileged matter and subject to the complete immunities there-

by. (emphasis supplied.)

The foregoing quoted language of the state act, particularly the italicized portion, implies a legislative determination that notices of dispute are not within the contemplation of privileged matter. Support for such implication is the fact that such notices are not matters properly within the "course of official conciliation and mediation activities" nor are they "information obtained directly or indirectly in the performance of this service of mediation." Further support for this inescapable conclusion are the above discussed provisions, and policies, of the federal act, which must, of necessity, be considered in any discussion or interpretation of the function of the state act.

057-362—November 18, 1957

PUBLIC LANDS AND PROPERTY

PROCEDURE FOR PURCHASE OF SUBMERGED LANDS BY TOWN OF COCOA BEACH FOR PUBLIC USE—CH. 57-362 (§253.122-253.0013, F. S.)

To: *Van H. Ferguson, Director, Internal Improvement Fund, Tallahassee*

QUESTION:

Where the town of Cocoa Beach applies to the trustees of the internal improvement fund for the purchase of sovereignty submerged lands for use as a sewage disposal plant, but said municipality is not the upland owner within the contemplation of Ch. 57-362, 1957, yet has the consent in writing of the upland owner, in view of §6 of said act, is it necessary to advertise said proposed sale in accordance with §1 thereof?

Section 1 of said Ch. 57-362, after vesting all submerged sovereignty lands in the trustees of the internal improvement fund, provides that they may sell such lands unless such sale would be contrary to public interest. In addition, it requires that notice be given to each upland owner lying within 1,000 feet of the land proposed to be sold who shall have the right to make objections. It limits the sale of lands within the provisions of the section to "the upland riparian owner."

Section 6 of Ch. 57-362 reads as follows:

The limitations and restrictions imposed upon the construction of islands or the extension or addition to existing lands or islands bordering on or being in the navigable waters as defined in section 253.12 herein shall not apply if such construction or extension is by any state, county or city or other political subdivision exclusively in a governmental or proprietary capacity for a municipal, county, state or public purpose, of lands of which it is the riparian upland owner or holds the consent in writing of the riparian upland owner consenting to such construction or extension; nor shall the provisions of this act apply to any submerged lands heretofore conveyed by deed or statutes to any county, city, public corporate body or other political subdivision of the State of Florida. (Emphasis supplied.)

You have advised us that the municipality has the consent in

writing of the riparian upland owner consenting to such contemplated construction or extension. It is only logical to conclude that the legislature must have intended that a municipality under the circumstances should not be required to be the upland owner in order to purchase submerged lands, but that with the required written consent in hand, it in effect replaces the upland owner in the matter of filling and adding to existing lands.

Section 6 read in connection with §1 of the act indicates that where the state, county, city or other political subdivision is the applicant, notice would serve no useful purpose and is unnecessary inasmuch as the trustees would have no legal justification to deny the purchase under the circumstances.

057-363—November 19, 1957

CRIMES

VIOLATION OF STATE LOTTERY LAWS—THEATRE BINGO GAME

To: A. R. Surles, Jr., *State Representative, Lakeland*

QUESTION:

A theatre wishes to sponsor a game of bingo, permitting regular patrons who are already in the theatre to play the game and also allowing anyone to play without buying an admission ticket or spending anything of value. Prizes would be offered the winner. Is this a lottery?

It is well settled that there are three basic elements to a lottery, viz: (1) a prize, (2) an award by chance, and (3) a consideration.

That a prize and an award by chance are included in this scheme is quite apparent.

The element of consideration becomes manifest by the fact that the bingo game itself and the opportunities offered by playing same constitutes an additional inducement to the public to patronize this particular theatre rather than theatres in competition thereto, all of which tends to attract more patrons to the said theatre and thereby enhance the value of this particular business enterprise to the owner thereof.

The scheme as above outlined, if put into operation, would therefore constitute a violation of the strict letter of the lottery laws of Florida.

We are enclosing, as per your request, copies of two recent opinions (057-299 and 057-324) rendered by this office which may be of additional assistance to you on this subject. It is also suggested, for a rather exhaustive treatment of this subject, that you refer to *Creash v. State, Fla.*, 179 So. 149 and *Little River Theatre Corp. v. State ex rel. Hodge, Fla.*, 185 So. 855.

057-364—November 19, 1957

PUBLIC BUSINESS

DECALCOMANIA REVENUE STAMPS—PROCEEDINGS REQUIRED WHEN PURCHASED—§§287.011 AND 283.03, F. S.

To: H. G. Cochran, Jr., *Director Beverage Department, Tallahassee*

QUESTION:

When purchasing decalcomania revenue stamps, to

be used in connection with the administration and enforcement of the cigarette taxes and the alcoholic beverage taxes, should the department comply with Ch. 283 or Ch. 287, F. S., when letting contracts for such revenue stamps?

"All public printing of the state shall be let out upon contract to the lowest responsible bidder . . ." in accordance with the requirements of Ch. 283, F. S. If such revenue stamps are to be classified as "public printing" then they constitute class "B" public printing (§283.04, F. S.) and are subject to the requirements of §283.10, F. S. On the other hand, if the procurement of such revenue stamps is not the obtaining of "public printing" but the purchase of "commodities, goods, merchandise, equipment or other personal property" within the purview of Ch. 287, F. S., then the provisions of that chapter are applicable and not Ch. 283, F. S. Section 287.011, F. S., excludes materials covered by Ch. 283 from the purview of Ch. 287. The answer to the above question seems to turn upon the determination of whether decalcomania revenue stamps are public printing or commodities, goods, merchandise, equipment or other personal property.

Decalcomania is defined, in *Encyclopedia of Printing Inks*, Harry G. Kriegel, p. 173, as follows:

The trade name of a process for making a print and transferring it upon glass, porcelain, wood, or steel and brass; when correctly made and transferred it looks as if it were a part of the body it is transferred to Process plates are not suitable for decalcomania for the very simple reason that the decalcomania process is a lithographic process and not a letter press process.

To the same effect see also *American business directory*, by Lazarus; Webster's new international dictionary, 2nd ed. unabridged.

Decalcomania products have been considered by the courts as printed matter since as early as 1878 when the supreme court of the U. S. held that decalcomania products were printed by lithographic process and were subject to duties as printed matter (*Arthur v. Moller*, 1878, 97 U. S. 365, 24 L. ed. 1046). In *Caille v. Kingsland*, 73 F. Supp. 921; *Meyercord Co. v. Palm Brothers Decalcomania Co.*, 31 F. ed. 651, a decalcomania was specifically defined as:

Lithograph printed upon paper coated with a soluble adhesive that releases the paint and color form upon wetting to permit it to be transferred from the paper to some other object.

Lithographic printing originally was the art of printing from stone, but now applies to printing processes depending upon the mutual repulsion of water and greasy ink. Damp rollers pass under the surface, followed by inking rollers. The design, which is greasy, repels the water but retains the ink (also greasy), which is transferred to the paper. In modern practice, a sheet of zinc or aluminum grained to retain moisture is commonly used in place of stone (*Chambers Technical Dictionary-McMillan Co.*, 1948).

We have been informed by representatives of companies engaged in both printing business generally, and the production of decalcomania products, that decalcomania, or "decals" as they

are commonly known, is an extremely high-type of lithographic printing and is considered by persons engaged in printing business to be printed matter. The process of which the decal is the finished product is performed on printing presses of either letter press, off-set press or silk screen press type. We have also been informed that recent developments in the production of decalomania products now permit this work to be done on any of the aforementioned types of printing presses.

We note that the court, in *Arthur v. Moller*, supra, said that decalomania products were printed by lithographic process, and that in the *Encyclopedia of Printing Inks*, supra, it is stated that the decalomania process is a lithographic process and not a letter press process. In *State v. Lee*, 150 Fla. 35, 7 So. 2d 110, the citrus commission had contracted with Arthur Kudner, Inc. for the lithographing of certain advertising materials, which were produced in another state, which the relator contended was not within the purview of Ch. 283, F. S., and the respondent contended it was within the purview of said chapter and in violation of §283.03, F. S. The court stated that "the manufacture of the booklets is *public printing* for a state agency and within said chapter 283." (Emphasis supplied.)

In the state budget commission's report to the 1955 and 1957 legislature it seems that funds were appropriated for the purchase of alcoholic beverage and cigarette taxes as printing and not as the purchase of commodities, goods, merchandise, equipment or other personal property. We are thus led to the conclusion that decalomania revenue stamps, such as those purchased by the state beverage department, in connection with its administration and enforcement of the cigarette and the alcoholic beverage taxing statutes, are printed matter and, therefore, under the purview and regulation of Ch. 283 and not Ch. 287, F. S.

The above observations and authorities answer the above stated question; however, there may become involved the effect and operation of §283.03, F. S., requiring that public printing be done in this state. The court, in *State v. Lee*, 117 Fla. 779, 158 So. 461, text 464, and in *State v. Lee*, 150 Fla. 35, 7 So. 2d 110, text 113, after referring to the statutory requirement that public printing shall be done in the state (§283.03, F. S.), stated that:

Such statutory requirements necessary imply that conditions shall exist in the state under which the particular requirements for a particular job can be fulfilled, because no purpose is evidenced by the statute to handicap or restrain officers and departments in the kind of printing that they may have done. The only limitation is that, if the work can be procured to be done within the state of Florida by one of two or more competing Florida firms having plants in this state, and prepared to execute the work in this state, then the class of persons who are eligible to become bidders shall be restricted to Florida concerns and Florida printing establishments only, and that no such work shall be let to any other class of bidders, nor any funds disbursed to the latter class therefor. (Emphasis supplied.)

Therefore, under said §283.03, if decalomania revenue stamps "can be procured to be done within the state by one of two or more competing Florida firms having plants in this state, and prepared to

execute the work in this state," then contracts for the furnishing of such decalcomania revenue stamps must be let to firms within the state, otherwise such contracts may be let to firms without the state. Where such contracts are let to firms in other states the minutes of the state agency should show clearly the facts and circumstances authorizing the letting of the contract to out-of-state firms notwithstanding the requirements of said §283.03, F. S., as well as all details concerning the application for bids, the bidding, the opening of bids and the letting of the same.

057-365—November 19, 1957

**OLD AGE SECURITY INSURANCE
MUNICIPAL HOSPITAL BOARDS OF THE STATE AS
POLITICAL SUBDIVISIONS**

To: Herbert W. Miller, Assistant Director OASI, Tallahassee
QUESTION:

Are municipal hospital boards, such as the municipal hospital board for the city of Lakeland, political subdivisions of the state, or agencies or instrumentalities of subdivisions of the state, for OASI purposes?

The question presents a federal and not a local or state question. Paragraph (2), subsection (b), §418, title 42, of the U. S. code, relating to federal old-age, survivors and disability insurance benefits, under federal social security, defines the term, "political subdivision," as used in said §418, as including "*an instrumentality of (A) a state, (B), one or more political subdivisions of a state, or (C) a state and one or more of its political subdivisions.*" Paragraph (5) of the same subsection, section and title, defines the term "coverage group," as meaning "(A) employees of the state, other than those engaged in performing service in connection with a proprietary function; (B) employees of a political subdivision of a state, other than those engaged in performing service in connection with a proprietary function; (C) employees of a state engaged in performing service in connection with a single proprietary function; and (D) employees of a political subdivision of a state engaged in performing service in connection with a single proprietary function." Although persons may by reason of the type of their employment fall within two or more of the last above groups, they may be included in only one of such groups for social security purposes.

So far as we have been able to find, the only specific definition of a political subdivision in the U. S. code is that contained in §617k, title 43, which defines a political subdivision as including "any state, irrigation or other district, municipality or other governmental organization." This statute related to public lands. Generally "political subdivisions," have been applied to counties, districts, municipalities, and other divisions of a state (72 C. J. S. 223 and authorities therein referred to; 43 Am. Jur. 271, §1; 32 Words and Phrases, 522-532). Although *Re. City of Fort Lauderdale*, DC Fla., 23 Fed. Supp. 229, text 234-5, *Keggin v. Hillsborough County*, 71 Fla. 356, 71 So. 372, text 373, and *Kaufman v. Tallahassee*, 84 Fla. 634, 94 So. 697, text 698, 30 A. L. R. 471, may in effect hold that municipalities in Florida may not be subdivisions of the state under Florida law, we are of the opinion that they are political subdivisions for the pur-

poses of §418, title 42, of the U. S. code; however, this is a federal question for ultimate determination by federal authorities. The definition found in §650.02(6), F. S., appears to have been an attempt on the part of the state to adopt the definition of "political subdivision" found in said paragraph (2), subsection (b) of §418, title 42, of the U. S. code, above mentioned.

We now come to the term "an instrumentality" of a state, or of a political subdivision of a state. After examining 2 Words and Phrases, 464-6; 21 Words and Phrases, 690-3; 40 Words and Phrases, 19-20, we conclude that the said term relates to public agencies, institutions, authorities, etc., by and through which the state and its subdivisions exercise their powers, duties and obligations. The state tuberculosis board (*Kennard v. State Tuberculosis Board*, 129 Fla. 619, 176 So. 872) and the Florida citrus commission (*State v. Arthur Kudner, Inc.*, 150 Fla. 351, 7 So. 2d 110) have been held to be agencies or instrumentalities of the state, as was a public hospital for the insane (*Re. Hicks*, 180 Misc., 173, 40 N. Y. S., 267). The Boston city hospital, which appeared to have been used primarily as a charity hospital, was held to be an "instrumentality of a political subdivision of the state" (*Mallory v. White*, DC Mass., 8 Fed. Supp. 989, text 992). A municipal hospital may well be an instrumentality of the municipality owning it, as would a county hospital be an instrumentality of the county owning it.

The Morrell memorial hospital appears to have been owned and operated by the city of Lakeland, a municipal corporation, when Ch. 57-1506, was enacted (see *Bryant v. Lakeland*, 158 Fla. 151, 28 So. 2d 106). The management of the affairs of this hospital was stated, in said *Bryant v. Lakeland*, to be "in the exercise of a proprietary or corporate capacity as distinguished from one governmental in nature." Under its charter (Ch. 10754, 1925) the city commission of Lakeland "shall have power . . . to establish and maintain hospitals and provide for the indigent, sick, afflicted. . . ."

Chapter 57-1506, supra, created a "Municipal Hospital Board of the City of Lakeland . . . who shall be appointed by the City Commission" Vacancies are filled by the city commission. It is made the duty of the said board "to manage and operate the Morrell Memorial Hospital for the City of Lakeland." "To assume the custody of all the real and personal property of the hospital and provide for the proper preservation of the same." The board is required to prepare and adopt an annual budget "and submit a copy thereof to the City Commission." "In no event shall the City of Lakeland, Florida, be or become obligated for expenditures or obligations of the hospital in excess of the actual cash receipts received during any fiscal year." Should the said board exceed its annual budget it is subject to removal by the city commission who appoints its successors. The treasurer of the board is required to "give a fidelity bond in the usual terms payable to the City of Lakeland" It seems that the said board operates the hospital for the city of Lakeland, that they have the custody, but not title to, the real and personal property of the hospital, and are appointed by the city commission, including their successors.

The municipal hospital board of the city of Lakeland is the agency or instrumentality by and through which the said hospital is operated. The said board is not of itself a political subdivision, but is an instrumentality of a political subdivision, to wit, the city of Lakeland. The said board is not a juristic entity legally separate

and distinct from a political subdivision (the city of Lakeland) and its employees are in law employees of the city of Lakeland. The municipal hospital board of the city of Lakeland is an instrumentality of a political subdivision (the city of Lakeland) and not a political subdivision of itself.

057-366—November 19, 1957

INSURANCE

"FUNERAL INSTRUCTIONS" AS "PRE-NEED BURIAL CONTRACT" PURSUANT TO §639.07, F. S.—§§639.06, 639.17, F. S.
To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

Does the form entitled "Funeral Instructions," a copy of which was attached to the request for this opinion, if it were executed, constitute a pre-need burial contract as defined in §639.07, F. S.?

The form entitled "Funeral Instructions," attached to your request for this opinion, purports to be a series of instructions concerning funeral arrangements "For the purpose of relieving (chosen relative) of the burden of making decisions and arrangements in the event of need . . ." It contains no provision for the payment of money nor is it a promise to pay at any time.

Sections 639.06 through 639.17, F. S., were added to Ch. 639, F. S., by Ch. 28211, 1953. The said sections pertain to "Pre-need burial contracts." Section 639.06, F. S., is a declaration of policy. It indicates that the purpose of these sections is to prohibit the collection of money, under a contract to perform funeral services or supply burial equipment or both, prior to the death of the beneficiary, unless the funds collected are held and managed subject to the regulations and limitations of the subsequent sections. The apparent concern of the legislature was that funeral services paid for in advance are, in fact, performed when the time comes.

The definition of "pre-need burial contract" in §639.07, F. S., is as follows:

(2) "Pre-need burial contract" means any contract, other than a contract of insurance, under which, for a specified consideration paid in advance in a lump sum or by installments, a person promises, upon the death of a beneficiary named or implied in the contract, to furnish funeral services or burial supplies and equipment.

If, therefore, the form "Funeral Instructions" is what it purports to be and is not accompanied by any prepayment of funds for funeral services or equipment, then the execution of said form does not constitute a "pre-need burial contract" as defined in §639.07, F. S. Your question is answered in the negative.

057-367—November 19, 1957

PUBLIC LANDS AND PROPERTY

AUTHORITY OF LEGISLATURE TO CONVEY STATE LANDS—CH. 57-502, GOAT ISLAND—CH. 610 OF 1855 (CH. 253, F. S.)
To: LeRoy Collins, Governor of Florida, Tallahassee

QUESTION:

Does the legislature have authority to grant or to re-

quire the trustees of the internal improvement fund to convey certain islands in Duval county?

The minutes of the trustees of the internal improvement fund reflect that a proposed sale of Goat island to private interests was cancelled by the trustees until after the 1955 legislature to see what Duval county and civic groups therein could secure by way of legislation authorizing development of Goat island "as a port or some other public purpose." The minutes also show a controversy with the Florida ship canal authority over its claim to Goat island; a request from the county for a conveyance; offer of the Ship canal authority to quitclaim to trustees (which was later accomplished) and the passage of a bill by the senate at the 1955 legislature (see Minutes Internal Improvement Fund, 1952-1954, Vol. 29, p. 641; 1954-56, Vol. 30, pp. 425, 430, 482 and 612). Finally this matter culminated in the legislature by passage of Ch. 57-502, granting to Duval county the lands lying in the St. Johns river in said county, commonly known as Goat island. The trustees of the internal improvement fund by this act were empowered and directed to make conveyance of the lands to Duval county upon payment of \$2.50 per acre.

With this brief factual background in mind, we now discuss the legal situation involved referring to applicable legal precedents. By the submerged lands act (67 Stat. 29, 43 U.S.C.A. 1301, et seq.) the U. S. vested title in the various states bordering on tidal waters to certain off-shore submerged lands. The constitutionality of this act was upheld in *State of Alabama v. State of Texas*, 1954, 74 Supreme Court 481, 347 U. S. 272, 98 L. Ed. 689 reh den. 74 Supreme Court 674, by the court's refusal to question congressional power to cede land to the various states.

By Ch. 610, 1855, the legislature created the trustees of the internal improvement fund, whose duty it became to administer state owned lands. The creation of this agency did not take away the power of legislature by legislative acts to grant state lands. In *Trustees of Internal Improvement Fund v. Root*, 59 Fla. 648, 51 So. 535 the court in its syllabus, headnote 5, stated:

It is within the power of the legislature to direct that the lands held by the trustees of the internal improvement fund be sold to actual settlers at reduced prices upon stated conditions, and such legislative direction should be observed by the trustees, where private rights are not thereby violated.

The court, at p. 536, held in this opinion:

... The Legislature did not lose control of the lands "irrevocably vested" in the trustees. All the authority possessed by the Legislature with reference to the lands before the passage of Chapter 610 was possessed after its passage, except that no vested rights could be impaired by subsequent legislation. The powers and duties of the trustees with reference to the lands were and are subject to legislative control when property rights of third persons are not involved. ..."

In *Seaboard Airline Ry. Co. v. Board of Bond Trustees*, 91 Fla. 612, 108 So. 689, 46 A.L.R. 870, the court cited among other cases, trustees of the internal improvement fund v. Root, supra. The court in this opinion, at p. 692, referring to lands con-

veyed to the state by congress for internal improvements, said:

... The trust so imposed cannot be questioned by a private party, corporation, or subordinate governmental agency like appellee. . . ."

The court, at p. 697, held:

... In its conclusiveness there is no better evidence of title than a legislative grant. The granting act is equal in dignity to a patent, and all those acquiring title to public lands over which a right of way has been granted take subject to such grant. . . .

It is stated in 81 C.J.S., States, §107, p. 1079:

State property cannot be disposed of except by authority of law but, in the absence of constitutional limitations, the state may convey its property in any way it sees fit. *The power to dispose of State property is vested in the legislature.* (Emphasis supplied.)

In *State ex rel Buford, Att. Gen. v. City of Tampa et al*, 88 Fla. 196, 102 So. 336, the state tested the validity of a legislative act which placed in the city of Tampa title to certain islands and bay bottom lands. The city of Tampa was attempting to contract away certain of these lands to a private individual for subdivision development purposes. The supreme court upheld the constitutionality of the legislative act.

This same Tampa grant again came into litigation in *Tampa Northern R. Co. v. City of Tampa*, 104 Fla. 481, 140 So. 311, when the city of Tampa questioned its authority to make a gratuitous conveyance to the plaintiff for commercial and industrial purposes. The court upheld the conveyance, saying that the validity of the grant from the state was settled in *State ex rel Buford v. City of Tampa*, supra, and the city of Tampa had authority to convey the property.

The court in this case, at p. 312, also held on the question of consideration:

... Consideration is the inducement to a contract. In other words, it is the cause, motive, price, or impelling influence which induces one to enter into a contract. It may be valuable, as when founded on money or its equivalent; it may be good as when founded on morals affection; it may be express as when specifically stated, or implied as when inferred by law from the conduct of the parties; it may be continuing as when consisting of acts performed over a period of time. Other classifications might be enumerated. A contract may be supported by any act of the plaintiff from which the defendant derives a benefit, or it may be supported by any labor, detriment, or inconvenience, however small, sustained by the plaintiff, if such act as performed or inconvenience suffered is by the consent express or implied of defendant. . . ."

The court in *Trustees of Internal Improvement Fund v. Root*, supra, upheld the validity of a statute which authorized the sale of state land at an admittedly reduced price.

The land to be conveyed by the act in question is to be used for industrial sites, the development of port and harbor facilities, and for such lawful public purpose as the board of county commissioners may direct. This land cannot be sold by Duval county. Under the above authority, and in light of the public purpose involved,

even assuming consideration is necessary, I believe there is adequate consideration to support this conveyance. All of the authorities that we find support the validity of legislative grants of public lands of the kind here considered. We do not believe that there is legal precedent or authority upon which a suit could be successfully maintained to invalidate this legislative grant.

Your question is answered in the affirmative.

057-369—November 21, 1957

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

SHERIFF'S BUDGET LAW—COMPETITIVE BIDS—§§30.47-30.54 AND 125.08, F. S.

To: Lawrence Rogers, County Attorney, Kissimmee

QUESTION:

Does a sheriff within the purview of Ch. 57-368, have to comply with the provisions of §125.08, F. S., which requires competitive bids?

The pertinent part of §125.08, F. S., provides:

... and no contract shall be let by the board of county commissioners of any county having a population of less than thirty-nine thousand and more than ten thousand according to the last past federal census, for the working of any road or street, the construction or building of any bridge, the erecting or building of any house, nor shall any goods, supplies or materials for county purposes or use be purchased when the amount to be paid therefor by the county shall exceed five hundred dollars, unless notice thereof shall be advertised once each week for at least two weeks in some newspaper of general circulation in the county, calling for bids upon the work to be done or for the goods, supplies or materials to be purchased by the county, and in each case the bid of the lowest responsible bidder shall be accepted, unless the county commissioners shall reject all bids because the same are too high; ... (emphasis added).

Similar provisions are made for counties with lesser and greater populations with different limitations as to the amount.

"Statutes requiring competitive bidding are to be construed strictly, and are not to be extended beyond their clear implication. However, they should receive a construction which effectuates their true intent and avoids circumvention" (20 C. J. S. 1020, §183). The purpose of a competitive bidding statute is to protect the public against collusive contracts and prevent favoritism by public officers (Wester v. Belote, 103 Fla. 976, 138 So. 721). If not required by statutes, competitive bidding is not necessary, and a contract may be made by any applicable method that will protect the public (Mitchell v. Walden Motor Co., 235 Ala. 34, 177 So. 151).

Section 125.08, F. S., provides for contracts which are made by the board of county commissioners and to this extent it is mandatory and must be complied with. However, I do not believe that it extends to those expenditures made by a sheriff under the authority of Ch. 57-368.

There is no provision in Ch. 57-368 which requires a sheriff to receive bids; on the contrary the statute provides:

The independence of the sheriffs shall be preserved concerning the purchase of supplies and equipment . . .

The sheriff of the county under Ch. 57-368 receives an amount to be expended by him for expenses and equipment. He is required to keep a budget record and must charge all paid bills to the proper budget accounts. He may in his discretion, transfer the reserve for contingencies or any part thereof to any of the budget appropriations.

Chapter 57-368, by its language provides that the sheriff shall make his own purchases. To require him to submit his needs to the board of county commissioners for competitive bids would effectively take his purchasing power away and place it back in the board of county commissioners.

Since Ch. 57-368 contains no provision for competitive bids, I do not believe they are required. However, public policy indicates that competitive bids should be taken even when not required by law, and I believe it would be in the public interest to receive them.

Your question is answered in the negative.

057-370—November 26, 1957

CRIMINAL PROCEDURE

JUDGMENTS AND SENTENCES—ENFORCEMENT

To: *J. Louie Carter, Clerk Criminal Court of Record, West Palm Beach*

QUESTION:

When a payment of fine is in default and the defendant has been released from custody, what is the procedure necessary for enforcement of judgment and sentence where fine is imposed with or without imprisonment as alternative sentence and the defendant is released from custody after sentence by (1) the sheriff on a 90-day cost bond (FSA 921.15), or (2) by the trial judge on court order stating time for future payments?

I note that, among other things, your said question mentions a fine being imposed "without imprisonment as alternative sentence." Such a sentence is not in compliance with §921.14, F. S., which reads as follows:

921.14 Sentence of imprisonment for default of payment of fine.—Whenever a court shall sentence and adjudge a person to pay a fine or a fine and costs of prosecution such court shall also provide in such sentence a period of time for which such person shall be imprisoned in default of the payment of the same.

Whenever a sentence is imposed upon a person, as distinguished from a corporation, §921.14 should always be complied with. Because of said statute, it is no longer lawful to follow the common law practice of ordering a defendant committed to custody until the fine imposed upon him was paid, which practice was approved in *Ex parte Peacock*, 6 So. 473, mentioned in your letter, and in *Ex parte Bryant*, 4 So. 854 (see *Roberts v. State*, 11 So. 536). If §921.14 is not complied with, the defendant cannot be incarcerated for any period of time whatsoever for failure to pay the fine. Section 922.01, providing for the commitment of the defendant after

sentence, does not authorize a commitment when only a fine is imposed without an alternative term of imprisonment.

I also note that your question refers to a case where a fine is imposed and the defendant is released from custody after sentence under order of the trial court stating the time for future payments. Any order of this kind is void. The trial judge may suspend or withhold the imposition of sentence, but he is without power to suspend the operation of the sentence or any part of it after it is once imposed (*Tanner v. Wiggins*, 45 So. 459; *Ragland v. State*, 46 So. 724; and *Pensacola Lodge, etc., v. State*, 77 So. 613). If a defendant upon whom a fine is imposed wishes time in which to pay it, the proper procedure is for him to make a 90-day bond under §921.15, F. S., not for the trial court to enter an order purporting to allow time payments to be made on the fine. Of course, as stated by our supreme court in *Tanner v. Wiggins*, *supra*, the trial court has the right to suspend the execution of a sentence already lawfully imposed "for purposes of giving effect to an appeal, or where accumulative sentences are imposed, and perhaps in some cases of necessity or emergency," but not otherwise; certainly not for the purpose of allowing the defendant time to make payments on the fine.

It is noted that in said case of *Tanner v. Wiggins*, where the county court sentenced the defendant to be confined in the county jail for 12 months but ordered that upon payment of \$50 and costs the sentence be suspended during such time as the defendant abstained from selling liquor and from being where liquor was sold and from maintaining, keeping or being interested in any place of business where liquor was sold or kept, the supreme court held that the clerk of the county court had the authority to issue a commitment despite the county court's void order suspending the operation of the jail sentence. Therefore, if the defendant has been sentenced to pay a fine and, in default of payment, to serve an alternative term of imprisonment, and has been released under a court order stating the time for future payments on the fine, I think that the decision in *Tanner v. Wiggins*, *supra*, authorizes the clerk to issue a commitment and authorizes the sheriff to imprison the defendant under said commitment despite the said order. If the court has failed to impose an alternative term of imprisonment as required by §921.14, there is no basis for the issuance of a commitment or for the incarceration of the defendant.

If the sheriff accepts a 90-day bond to secure the payment of a fine, and if default is made in paying the bond, the provisions of §921.15 should be followed. Said section requires that in such case the sheriff shall endorse on the bond that default has been made in payment and, having signed such endorsement, shall file the bond with the clerk of the court in which judgment was rendered; that the clerk shall forthwith issue execution for the amount of the fine and costs against the security or bail as if there had been judgment at law on the bond; and that the same proceedings shall be had as in cases of other executions. Of course, if the defendant has paid a part but not all of the amount of the bond before the sheriff places thereon the endorsement required by the statute, the sheriff should specify in his said endorsement the amount thus paid and should specify that the balance of the bond has not been paid, and in such case the clerk should issue execution for the amount remaining unpaid instead of for the whole amount of the bond.

Section 921.15 also provides that in case of default in payment the person convicted shall be liable to be proceeded against as if no such bond had been given, until the same has been fully paid and satisfied, which means that if a commitment has been issued to enforce a sentence imposing an alternative term of imprisonment for failure to pay the fine, the defendant is subject to being incarcerated under such commitment. However, if no such alternative term of imprisonment is imposed, then no commitment of the defendant to jail is authorized and the sheriff has no authority to take the defendant into custody on account of the nonpayment of the bond.

I think that a sentence is incomplete when it merely imposes a fine without requiring an alternative jail sentence to be served in default of payment, as provided by §921.14, and therefore when such a sentence is erroneously imposed I am inclined to the opinion that if the defendant fails to pay the fine, or if, having given a 90-day bond for the fine, default is made in payment of the bond, the court may at a later time procure the presence of the defendant before it and complete the sentence by adding a provision for an alternative term of imprisonment, and that thereupon the defendant may be committed under the sentence as so completed.

057-371—November 26, 1957

CORPORATIONS AND BUSINESS TRUSTS

USE OF "CLUB" IN CORPORATION—§§608.62-608.65, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Is it permissible for the secretary of state to accept articles of incorporation from a group proposing to incorporate under the name of Nite Club U-Tour-It, Inc. or Nite Club Tour-It-Yourself, Inc., in view of §§608.62-608.65, F. S., relating to the word "club" in corporate names?

In the instant case, the term night club is a combination of words used to describe "a commercial establishment operating at night to supply food, drink and entertainment to its customers," Webster's new collegiate dictionary. The word "club" as used in the corporate name in question is not utilized to describe the type of association as such, but rather it is used only as a descriptive adjective inseparably combined with the word "night" to explain the activities of the organization to the buying public.

The guided night club tour has become a legitimate big business in tourist cities in this country and abroad. To deprive the proprietors of such tours the right to use the word "club" in their trade or business names would be as damaging as a denial of the use of the word "cafe" would be to the members of the restaurant trade. Suitable synonyms for the words "night club" cannot be found in Webster's dictionary or any other source of merit. Such words as "supper club" and "night spot" have been suggested but neither is as definite in meaning, and "supper club" contains the same statutory objection. One of the main purposes of an organizational name is to identify the organization with a type or kind of business. In the instant case, the denial of the use of the word "club" in a corporate name would serve no legal object except to force these parties to choose a name which would

not serve the above mentioned purpose. This point illustrates the distinction between this question and the Tampa yacht club stables question (A. G. O. 052-255, 1951 B. R., p. 637) wherein it was held that the word "club" as used therein was in violation of the Florida corporation laws. In that case, "stables" was the identifying word and the word "club" served no purpose except to infer that the organization was a nonprofit social group.

From the facts set out above, it is evident that the word combination "night club" could not be construed by any reasonable man possessed with the barest essentials of common knowledge as a representation or *misrepresentation* in the light of §608.62, F. S., or as a guise for deception as is prohibited by §608.63, F. S. It is the opinion of this office that the word "club" as used in §608.64, F. S., is to be interpreted in the light of the preceding §§608.62 and 608.63, F. S., rather than as an all-inclusive term of such organizations as Cliquot Club Bottling Co. (discussed in A. G. O. 046-330) would be prohibited from the use of long established trade names. The name under discussion certainly does not carry any implication of design for illegal tax exemption as is prohibited by §608.65, F. S.

As it was stated in A. G. O. 046-330, 1945 B. R. at p. 660, the most gullible or credulous rational person could not construe the name under discussion as indicating an intended representation that its purpose and activities should be accepted as those of a "club" as such term is used in §§608.62, 608.63, or 608.65. On the contrary, the purpose of the proposed corporation is to be gathered from its name and that purpose is obviously to engage commercially in conducting guided tours to night clubs. Therefore, the above question is answered in the affirmative.

057-372—November 27, 1957

JUDICIARY DEPARTMENT

COMPENSATION OF COUNTY JUDGE TEMPORARILY ASSIGNED TO NEIGHBORING COUNTY—§26(4), ART. V, STATE CONST., §§145.01 AND 145.03, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May a county judge, temporarily assigned to perform the duties of county judge in a neighboring county, retain the compensation earned by him during said temporary assignment, in addition to the maximum compensation that he may by law receive in his own county?

Your attention is invited to §26(4), Art. V, State Const., as amended, which provides that:

Except to the extent inconsistent with the provisions of this article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in a manner authorized by the Constitution.

Inasmuch as Art. V of the constitution, as amended and the rules of appellate procedure effective July 1, 1957, pertaining to the assignment of judges by the chief justice of the supreme court, makes no mention of the compensation to be paid an assigned county judge, the provisions of Ch. 145, F. S., relative to compensation of county fee officers, is controlling in this matter.

Section 145.01, F. S., provides:

Each county official whose compensation for his official duties is paid wholly or partially by fees or commissions, shall receive as his yearly compensation for his official services from the whole or part of the fees, or commissions so collected, the following sum only: all the net income from his office not to exceed seven thousand, five hundred dollars.

Section 145.03, F. S., provides that:

Each state and county officer who receives all or any part of his compensation in fees or commissions, or other remuneration, shall keep a complete record of all fees and commissions, or other remunerations collected by him, . . . (Emphasis supplied.)

When a county judge of one county is assigned by the chief justice of the supreme court, pursuant to rule 2.1(4)(h), rules of appellate procedure, to perform the duties of a county judge in a neighboring county, it would seem that such assignment would in effect make the performance of the assigned duties, official duties of the judge so assigned. The compensation received by the assigned judge for the duties performed in the neighboring county become a part of the income of the assigned county judge, as other remuneration. These funds are included in the gross income of the office of the county judge so assigned and used in computing the annual compensation of the county judge as appears in §145.01, F. S.

The question propounded is answered in the negative.

057-373—November 27, 1957

TAXATION

COLLECTION OF SALES TAXES ON ISOLATED OR OCCASIONAL SALES OF MOTOR VEHICLES—CH. 212, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May the state comptroller, under Ch. 212, F. S., as amended, authorize the collection of sales taxes on isolated and occasional sales of motor vehicles by the several county tax collectors and compensate them therefor?

Under §212.18, F. S., the state comptroller is required to "administer and enforce the assessment and collection of the taxes, interest and penalties imposed by" Ch. 212, F. S., as amended, including the taxes imposed by said chapter as amended upon isolated and occasional sales of motor vehicles. When motor vehicles are sold by dealers, either of new or secondhand motor vehicles, such dealers are required by law to collect and remit the tax to the state comptroller, for which they are paid a commission equal to 3% of the taxes collected as compensation for making such collections and remitting the same to the state. Under §212.18, F. S., the state comptroller is authorized to adopt and promulgate such rules and regulations as may be deemed necessary by him for the proper enforcement and administration of said Ch. 212, F. S. The state comptroller is of necessity empowered to employ sufficient personnel, within the office budget and appropriation of the office as provided by the statutes and laws applicable, for the enforcement of said Ch. 212, F. S., and the

collection of the taxes thereby imposed.

County tax collectors are by law required to distribute motor vehicle license tags and collect motor vehicle license taxes. They also administer certain phases of the motor vehicle title registration statutes. They are paid designated compensation for the performance of such services. Although there is no statute or law specifically requiring that county tax collectors receive or collect sales taxes on isolated or occasional sales of motor vehicles, we know of no rule of law that would prevent them, at the request of the state comptroller, collecting such taxes as agents of the said state comptroller. Under such circumstances they would be acting as employees or agents of the state comptroller and not as state officers (see *State v. Futch*, 122 Fla. 837, 165 So. 907). For such services the state comptroller would be authorized to pay the said county tax collectors a reasonable compensation. Inasmuch as such services performed by the tax collectors would be essentially the same as those performed by motor vehicle dealers it appears reasonable that the collectors should be allowed equivalent compensation. It would therefore seem proper for the state comptroller to allow the county tax collectors 3% of the taxes collected for their service in receiving or collecting said sales taxes on isolated or occasional sales of motor vehicles.

The above stated question is, therefore, answered in the affirmative. Such compensation should be considered and treated as income of the tax collector's office for purposes of auditing his accounts and settlement with the county as to excess fees.

057-374—December 2, 1957

TAXATION

HOMESTEAD TAX EXEMPTION—FAILURE TO FILE APPLICATION—EFFECT OF SICKNESS—§§192.12, 192.16, 192.55 (now repealed) F. S.,—§7, ART. X, STATE CONST.

To: Board of County Commissioners, Clearwater

QUESTION:

Where an owner of real property in this state and entitled to homestead tax exemption thereon, under §7, Art. X, State Const., fails to claim such exemption, because of illness, within the time required by §192.16, F. S., may he subsequently file such claim?

We are not here passing upon the right, under the state constitution and statutes, to claim homestead tax exemption, but are considering only the question of the right of a homesteader to file an application for homestead tax exemption subsequent to April 1 of the tax year. Under §192.16(1), F. S., applicable to your county, each taxpayer who claims homestead tax exemption, is required to file his claim therefor "with the assessor on or before April first of each tax year; and the failure to do so shall constitute a waiver of said exemption for such year." The present statute contains no provision authorizing a delayed filing of a claim for homestead tax exemption on account of illness or otherwise. Section 192.55, F. S., enacted in 1943 but now repealed, provided a waiver from the filing of such claims by members of the armed forces during world war II and thereafter until the repeal of said section; however, we find no like or similar statute now in the said statutes.

Under §193.12, F. S., every person "owning or having the control, management, custody, direction, supervision or agency" of real property in this state is required to return the same to the county tax assessor for taxation. We know of no prohibition against, or any reason why, the wife of a homesteader may not, so long as not specifically instructed otherwise, file an application for homestead tax exemption for and in behalf of her husband. There might even be circumstances where the wife might even over the objection of the husband file such an application. Under the statute the homesteader has from January 1 to April 1 of the tax year in which to file his application. Even though the homesteader be ill during all or most of such period of time, unless his condition or mind be such as to entirely disable him from filing such an exemption, or directing his wife or some other person to file the same in his behalf, we doubt that such an illness would authorize a belated filing of the application. Where the husband was too ill to file or direct the filing of a homestead tax exemption claim, we know of nothing which would prevent her filing such a claim for and in behalf of her husband.

Only in rare cases, if at all, should a belated application for homestead tax exemption be allowed, in the absence of statute making express provision therefor, and then only in cases where it is apparent that the applicant's condition was such as to prevent his filing or directing the filing of such a belated claim. Such condition, to authorize a belated filing, should be one of such nature as to disable the applicant from filing the same or directing the filing of the same during that part of the year prior to April 1 of the tax year.

The above observations seem to answer your inquiry as well as the same may here be answered.

057-375—December 3, 1957

CRIMINAL PROCEDURE

BAILBONDS—SURRENDER OF DEFENDANT BY BAILBONDSMAN TO SHERIFF—§903.20, F. S.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs Ass'n, Tallahassee

QUESTION:

Is the sheriff of county A required to accept surrender from a bailbondsmen of a prisoner who was originally arrested in county A on a capias issued from county B?

Your question states that the sheriff of county A had originally released the prisoner to a bailbondsmen upon posting the bond indicated on the capias. The bailbondsmen subsequently desired to surrender the prisoner, after the sheriff of county A had made appropriate return, etc. to county B.

The pertinent statute involved is §903.20, F. S., which provides:

At any time before there has been a breach of the undertaking any surety may surrender the defendant, or the defendant may surrender himself, to the official to whose custody the defendant was committed at the time bail was taken, or to the official into whose custody the defendant would have been given had he been committed." (Emphasis supplied.)

The prisoner under this provision must be surrendered to the person to whose custody he was committed, or to whose custody he would have been given had he been committed. The statute contemplates a commitment by the court, and the facts which you present indicate that the prisoner has never been committed. Thus, he will appear before a court in B county for commitment and the proper officer to accept surrender is the officer to whose custody he will be given upon commitment in B county. This officer is the sheriff of B county, and any surrender should be thus made.

The sheriff of A county was merely an instrument of the court in the apprehension of the prisoner, and his duty was complete when the arrest was made and the bond was taken. To require the sheriff of A county to accept a subsequent surrender by a bailbondsman would be contrary to the clear intent of the statute.

Your question is answered in the negative.

057-376—December 3, 1957

PUBLIC LANDS AND PROPERTY

PUBLICATION AND NOTICE BY REGISTERED OR CERTIFIED MAIL—GRANTS OR DEDICATION FOR PUBLIC USES UNDER §§253.122-253.0013, F. S. (CH. 57-362)

To: *Van H. Ferguson, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTION:

Is publication, and notice by registered or certified mail to upland riparian owners within 1000 feet necessary under the provisions of Ch. 57-362, in the following instances: (a) Grants of rights of way to state road department, cities, counties, port authorities; (b) Areas granted for public purposes such as schools, parks, municipal facilities, county or federal uses; (c) Areas dedicated for public uses in general or for specific public uses such as parks, schools, county and federal facilities?

In answering this question, I assume that the proposed purchaser is the upland owner, or has the written consent of the upland owner as required by §6 of Ch. 57-362.

In opinion 057-362, dated Nov. 18, 1957, I held that notice is not required where a city as the proposed purchaser is the upland owner or has the written consent of the upland owner. I based this opinion on §6 of the act which exempts from its operation extensions or additions "by any state, county or city or other political subdivision exclusively in a governmental or proprietary capacity for a municipal, county, state or public purpose, of lands of which it is the riparian upland owner or holds the consent in writing of the riparian upland owner consenting to such construction or extension; . . ."

The grants which you here present also fall within this excepted category.

Your question is answered in the negative.

057-377—December 3, 1957

TAXATION

TAX EXEMPTIONS—SALES OF EXEMPT PROPERTIES
AFTER TAX DAY—§1, ART. IX AND §16, ART. XVI,
STATE CONST., §§192.04 and 192.06, F. S.

To: John A. Gautier, County Tax Assessor, Miami

QUESTION:

Where real property is held and used exclusively for educational purposes by an educational institution on January 1 of a tax year, but is sold and conveyed on January 15 of the said tax year, for noneducational purposes, with possession of the said property being given on September 1 of said tax year, is such property entitled to tax exemption for all or any part of said tax year?

In this state real property held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes is exempt from ad valorem taxation (§1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S.). In this state real property is "subject to taxation on the first day of January of each year" (§192.04, F. S.). Its status as being subject to taxation or being exempt from taxation is determined as of said date (Thompson v. Key West, Fla., 82 So. 2d 749; Dolores Land Corp. v. Hillsborough County, Fla., 68 So. 2d 393; Simpson v. Hirshberg, 159 Fla. 25, 30 So. 2d 912).

In Simpson v. Hirshberg, supra, the homesteader was residing and making his permanent home on a parcel of land on Jan. 1 of the tax year; on Jan. 8 of said year he delivered to a purchaser a deed of conveyance conveying to him title to the said lands, and delivered possession to the said lands on Jan. 15 of said tax year. The premises were held to be tax exempt for the said tax year notwithstanding the said sale and conveyance.

In the light of these authorities and statutes under the circumstances mentioned in the above question, the lands, being held and used exclusively for educational purposes on Jan. 1 of the tax year were entitled to tax exemption for the entire tax year.

057-378—December 4, 1957

INSURANCE

FOREIGN INSURANCE COMPANY "DOING BUSINESS IN
THIS STATE"—§625.17, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Is a foreign insurance company "doing business in this state" within the contemplation of the insurance laws of Florida, which foreign insurance company is not licensed in Florida but maintains its headquarters in Jacksonville, from which it solicits business through the mails with residents of other states?

Section 625.17, F. S., provides:

Foreign insurance company doing business without a license.—Any foreign insurer of any class whatever doing business in this state without a license so to do shall be subject to a fine of five hundred dollars for each offense, to

be recovered by suit brought by the attorney general or a state solicitor in the name of the state.

As described in your letter and the attached file, the activities of this foreign insurance company are apparently conducted entirely with residents of other states and entirely through the mails. This immediately raises the question of whether or not this is interstate commerce and subject to the exclusive regulation of the federal government. This question is easily disposed of, however, as the congress of the U. S. has by law reserved the regulation and control of insurance business to the several states. Title 15, §1011, U.S.C.A., provides:

Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. Mar. 9, 1945, c. 20, §1, 59 Stat. 33.

The supreme court of the U. S. has established a general formula to determine the circumstances under which a foreign insurance company may be subject to the regulation of a state. In *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, the court said at p. 319:

We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract . . . of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight.

The first test enumerated by the supreme court of the U. S. is the "location of the activity prior and subsequent to the making of the contract." Clearly the foreign insurance company in question is doing business in Florida within that test. It has been argued in other jurisdictions in situations identical to the one in question that the state has no legitimate interests to protect since none of its citizens nor any of its property is affected. This argument was disposed of by an Ohio court in *State v. Amazon Ins. Co.*, 1 Ohio Cir. Ct. R. (NS) 4, as follows: "The fair name of the state and the good of the people of the state may be injuriously affected by the manner of transacting business here, although transacted solely with non-residents and wholly respecting property outside the state."

Another interest of the state to be protected was described in *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423. The court said at p. 425:

We have hundreds of domestic insurance corporations organized under our law doing business in this and other states, and hundreds of other foreign companies licensed under and complying with the laws of our state and doing business within the state, and the state is concerned in the maintenance of a standard of security and fair dealing according to the prescribed regulations for all. All those organized under our laws and those licensed and complying with our laws are in a sense citizens of our state, and are entitled to the protection of the law against companies

doing business in this state contrary to its laws, with less than the required capital, and so managed that by manipulation and transfer their obligations are avoided and the business brought into ill repute.

A third case has also held that a foreign insurance company with a principal place of business within the state, though it conducted its entire business through the mails with nonresidents, was subject to the regulation of the state (*State v. Midwest Mut. Ben. Co.*, 181 Okla. 338, 73 P 2d 1138).

The corporation dealt with in this opinion is not to be confused with National Automobile Insurance Co., a Georgia corporation, authorized to engage in business in this state. This latter company is an entirely different corporation, has its principal place of business in Atlanta, Georgia, and has its place of business or domicile for the purpose of service of process designated as 514 N. Florida Ave., Lakeland, Florida, according to its 1957 corporation report.

It is my opinion that the National Automobile Insurance Co. "is doing business in this state" in violation of §625.17, F. S. Your question is answered in the affirmative.

057-379—December 4, 1957

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—BOAT TRAILERS, DIRECTIONAL SIGNALS—§317.38, F. S.

To: H. N. Kirkman, Director, Public Safety, Tallahassee

QUESTION:

Are boat trailers required to have directional turn signals within the contemplation of §317.38, F. S.?

Section 317.38, F. S., provides as follows:

Signals by hand and arm or signal device.—

(1) The signals herein required shall be given either by means of the hand and arm or by a signal lamp or a signal device.

(2) It is hereby declared that a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, when the distance from the center of the top of the steering post to the left outside limit (or right in the case of a right-hand drive vehicle) of the body, cab, or load exceeds twenty-four inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load exceeds fourteen feet. The latter measurement shall apply not only to a single vehicle, but also to any combination of vehicles.

(3) Any vehicle or combination of vehicles constructed, loaded or capable of being loaded so as to exceed the dimensions hereinbefore promulgated shall be equipped with direction signals of a type approved by the department and said signals shall be in good working condition.

A vehicle is defined in §317.01(28), F. S., as:

Every device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

If any boat trailer, by its dimensions, exceeds the measurements described in the above quoted statute so as to obstruct view of a given arm signal, then the requirement for a mechanical device attaches, inasmuch as the statutes do not contain any exception relating to boat trailers. I believe it well, however, to repeat a previous statement contained in a former opinion (051-246), construing the effect of §317.38, which held:

It is recognized that in some instances it will be impractical if not impossible to install these signal devices on certain vehicles due to their special design and construction and in such cases, in order to carry out the intent and purpose of this act, the department of public safety may approve a special type of signal device for said vehicle.

The above statement was made in an effort to overcome any serious hardship attendant to the fulfillment of the requirement of §317.38, *supra*.

Your question is answered accordingly.

057-380—December 4, 1957

LIQUORS AND BEVERAGES

MINORS—PROHIBITED FROM MAKING SALES AND DELIVERIES OF BEER AND WINE—MUNICIPAL REGULATION
—§§562.111, 562.13, 450.071, F. S.

To: Board of Representatives, Tampa

QUESTIONS:

1. Does §562.13, F. S., prohibit minors from making sales or deliveries of packaged beer or wine?

2. If the answer to question 1 is in the negative, then may the board of representatives of the city of Tampa, by ordinance, prohibit such sales or deliveries by minors?

The statutes controlling the question you present in so far as the state law is concerned are §§562.111, 562.13, as amended by Ch. 57-327 and 450.071, F. S., which provide:

562.111 *Possession of alcoholic beverages by minors prohibited.*—It is unlawful for any person under the age of twenty-one years to have in his or her possession alcoholic beverages, except persons employed under the provisions of §562.13, F. S., acting in the scope of their employment.

562.13 *Employment of minors or certain other persons by certain vendors prohibited.*—It is unlawful for any vendor licensed under the beverage law to employ any person under twenty-one years of age; provided however, this section shall not apply to professional entertainers between the ages of eighteen and twenty-one years who are not in school, or to drug stores, grocery stores or automobile service stations which have obtained licenses to sell beer or beer and wine, where such sales are made for consumption off the premises only; . . .

450.071 *Employment in pool rooms, etc.*—No person under twenty-one years of age, whether such person's disabilities of nonage have been removed by marriage or other-

wise, shall be employed, permitted or suffered to work in, about, or in connection with, any poolroom, billiard room, brewery, saloon, barroom, or any place where alcoholic beverages are manufactured or sold; provided, however, this section shall not apply to professional entertainers between the ages of eighteen and twenty-one years who are not in school or to drug stores or grocery stores which have obtained a license to sell beer and wine, and where such sales are made for consumption off the premises only; and provided, further, this section shall not prohibit the employment of bellboys, elevator boys and others under the age of twenty-one years in hotels where such employees are engaged in work apart from the portion of the hotel property where alcoholic beverages are offered for sale for consumption on the premises.

We are assuming, for purposes of answering your question, that the places of business employing the minors fall within the category of those listed in §562.13, *supra*. That is to say, drug stores, grocery stores or automobile service stations which have only a beer or wine package license and may only sell package goods.

Acting on this assumption, the answer to your 1st question, in so far as the businesses specifically named in the statutes are concerned, is that minors are not prohibited from being employed in the said places of business and not prohibited from making sales or deliveries of packaged beer or wine. However, the statute does prohibit the employment of minors in all other alcoholic beverage dispensing places of business where such beverages are dispensed for consumption on the premises as was clearly pointed out by the supreme court in *Hunter v. Bullington*, 74 So. 2d 673, and this prohibition even includes a minor whose disability of nonage has been removed by marriage.

As to question 2, in so far as the regulation and control of alcoholic beverages is concerned, our supreme court has held that the legislature in enacting the state beverage law intended to inhibit all power of municipalities over the subject of intoxicating liquors except (1) the regulation of the hours of business, (2) the location of places of business, and (3) the prescribing of the sanitary regulations for these businesses (*City of Miami v. Kichinko*, 156 Fla. 128, 22 So. 2d 627).

We find in *Corpus Juris Secundum*, Vol. 62, p. 289, on municipal corporations, the following language:

The power conferred on municipal corporations is presumed to be in subordination to a public law regulating the same matter for the entire state unless a clear intent to the contrary is manifest.

Our court in the *Kichinko* case, *supra*, adopted the order and opinion of the lower court which said:

The beverage act is a taxing as well as a regulatory statute intended to have uniform operation throughout the state.

* * * * *

But the city asserts that it has the power, in its charter, to regulate or prohibit the sale of intoxicating liquor.

The State Beverage law supersedes any charter powers of the City of Miami over the subject of intoxicating liquor.

In the light of the foregoing and the limitations placed on the authority of municipal corporations to regulate the alcoholic beverage business, it is my opinion that the city of Tampa is without authority to prohibit minors from making sales or deliveries of package beer or wine from drug stores, grocery stores or filling stations holding beverage licenses for sale by the package only.

057-381—December 5, 1957

CRIMINAL PROCEDURE

INDETERMINATE SENTENCES—FORM FOR IMPOSITION PRESCRIBED BY §921.17, F. S. (§2, CH. 57-366)

To: *Charles E. Limpus, Clerk, Criminal Court of Record, Orlando*
QUESTIONS:

1. Is the sentence contained in the following form in accordance with the provisions of §2 of Ch. 57-366, which sets forth the form to be substantially followed in imposing indeterminate sentences, to-wit:

Now on this day came in person the Defendant _____ in open Court, and having been asked by the Court whether he had any cause to show why sentence of the law should not be pronounced upon him, says nothing.

You, _____, having been tried and convicted at this term of Court of the crime of _____ as charged in the _____ Count of the information, the Court adjudges you to be Guilty of said crime, as charged in said Count _____ of the information.

It is further Considered, Ordered and Adjudged, that you be imprisoned by confinement and committed to the custody of the department of corrections for a term of six (6) months to _____.

2. When a defendant is convicted under two or more counts of an information charging violations of the lottery law, how may the form of the sentence set out in said §2 of Ch. 57-366 be adapted to meet the rulings of the supreme court of Florida that sentence shall be pronounced in such cases only for the highest degree of felony for which the defendant is convicted?

3. If a defendant is convicted under two or more felony counts of equal degree for violations of the lottery law should the trial judge pronounce sentence on all of said counts collectively or should he select only one of said counts upon which to pronounce sentence?

AS TO QUESTION 1:

The form of sentence set forth in question 1, supra, appears to be in conformity with the approved form set out in §2 of Ch. 57-366, and that is all that is required by said §2. You understand, of course, that in accordance with the requirements of Ch. 57-366 the maximum penalty provided by law is to be inserted where the blank line appears at the end of said form; for instance, the words "five years" are to be inserted if the defendant is given an indeterminate sentence to the state prison for grand larceny.

AS TO QUESTIONS 2 AND 3:

I think that the approved form of indeterminate sentence set forth in §2 of Ch. 57-366 is quite adequate and requires no adaptation in a case in which the defendant has been convicted under two or more felony counts charging violations of the lottery law. However, I think that in such a situation the judgment, that is, the adjudication of guilt, should adjudge the defendant guilty under all of the lottery felony counts, since all of them are of the same degree, instead of adjudging him guilty under only one of such counts and that then sentence should be imposed in the form set forth in §2 of Ch. 57-366. I think that the applicable rule as to sentence in such cases was stated by the supreme court of Florida in *Cribb v. State*, 9 Fla. 409, 416, as follows:

We consider the rule to be that if all the counts are good, and such as on which judgment can be awarded, and the evidence warrants the conviction, to pass judgment on the count charging the highest grade of offense; but where the grades of offenses are equal in all the counts, as in the case at bar, the practice is to pass sentence on all the good counts of which the evidence is sufficient to sustain the verdict, if it is warranted by the law applicable to the offense charged in that count, on the presumption that was to them that the verdict of the jury attached. (Emphasis supplied.)

Construing the italicized words in the foregoing quotation in the light of the decisions hereinafter mentioned, I think that where some counts of a lottery information charge felonies and some counts charge misdemeanors, and the defendant is convicted under the felony counts *and* under the misdemeanor counts, one sentence should be imposed under all of the felony counts and no sentence should be imposed under the misdemeanor counts.

In *Mixon v. State*, 54 So. 2d 190, the 1st count charged the defendants with conducting a lottery and the 2nd count charged them with having lottery tickets in their possession. They were convicted under both counts. The trial court imposed sentence under the 1st count *and* retained jurisdiction to sentence them later under the 2nd count. The supreme court reversed, holding that only one sentence was justified. The offenses were committed prior to the adoption of Ch. 26765, 1951, and at the time they were committed the lottery statute, §849.09, provided the same penalty for all violations thereof instead of grading such violations into felonies and misdemeanors as was done by said Ch. 26765. Therefore, the two counts charged felonies of equal degree and, under the authority of *Cribb v. State*, *supra*, I think that it would have been quite proper for the trial judge to have adjudged the defendants guilty under both counts and to have thereupon imposed one sentence.

In *Young v. State*, 69 So. 2d 761, another lottery case, the trial court imposed a county jail sentence under the misdemeanor counts and a state prison sentence under the felony counts. The supreme court reversed, saying that there should be only one sentence and punishment and that the court should impose a sentence on the count which charged the highest grade or degree of the offense; and a like ruling was made in the companion case of *Williams v. State*, 69 So. 2d 766. Since there was no difference in degree as between the offenses charged in the several felony

counts in these cases, I think that under the Cribb case, *supra*, it would have been proper to impose one sentence upon all of the felony counts of which the defendants were found guilty.

In *Wheeler v. State*, 72 So. 2d 364, another lottery case, the defendant was found guilty by a jury on all five counts of the information, some charging felonies and some charging misdemeanors. The defendant was adjudged guilty and sentenced only under a misdemeanor count. The supreme court reversed with directions to adjudicate him guilty of the highest offense charged and to then pronounce the sentence that such an adjudication warranted. There was no difference in degree as between the felony counts; each of them charged the highest offense charged and I think that it would have been proper to impose one sentence upon all of the felony counts of which the defendant was convicted.

In *Norwood v. State*, 86 So. 2d 427, which is shown by the appeal record to be a lottery case, each of the two counts under which the defendant was convicted charged a felony against the lottery law and the trial court adjudged him to be guilty under both of said counts and imposed a separate sentence under each count, to run consecutively. The supreme court said, "We find no error requiring a reversal of the judgment convicting the appellant of the two offenses of which he was found guilty by a jury, . . .", but reversed because of the imposition of the two consecutive sentences.

After considering all of the above mentioned supreme court decisions together, I am of the opinion that when a defendant is found guilty by a jury or pleads guilty to two or more felony counts charging violations of the lottery law, the proper course to follow is to adjudge the defendant guilty of all of such felony counts and thereupon to either pronounce one sentence imposing a definite penalty in the usual form or to pronounce one indeterminate sentence in the form set forth in §2 of Ch. 57-366. Aside from what the supreme court said about the matter in the Cribb case, *supra*, this seems to me to be the practical thing to do. Under §849.09, it is a felony to commit any one of a number of acts connected with a lottery. If all of these acts are charged in the several counts of an information, one act in one count, another act in another count, etc., and if the defendant is found guilty under or pleads guilty to two or more counts, and if the trial court adjudges the defendant guilty of and sentences him under only one count, and if the appellate court holds the evidence insufficient to sustain the conviction under that count or holds that that count is insufficient in law to support a conviction, then there must be a reversal; on the other hand, if, as I suggest, the defendant is adjudged guilty of and given one sentence under all of the felony counts of which he is found guilty or to which he pleads guilty, I see no reason for a reversal even if only one of the counts adequately supported by the evidence is legally sufficient to charge a crime. The course here suggested may be followed by adjudging the defendant guilty of all lottery felony counts to which he has pled guilty or of which he has been found guilty, and by then pronouncing one sentence under said counts, whether it be a sentence imposing a definite penalty or an indeterminate sentence in the form prescribed by §2 of Ch. 57-366; if an indeterminate sentence is imposed, it is not necessary to alter the said statutory form in any way.

057-383—December 10, 1957

REGULATION OF TRADE AND COMMERCE

DOG RACING—APPLICATION FOR PERMIT TO CONDUCT
RACE MEETING—§§550.05 AND 551.12, F. S.

To: *Florida State Racing Commission, Miami*

QUESTION:

Where an original application for a permit to establish a dog track for the purpose of conducting greyhound race meetings in a county of this state has been timely filed and where an amendment has been made to the application prior to Aug. 10, and prior to Aug. 15 the commission after considering the application denied same and since the denial and after Aug. 15 a subsequent amendment has been filed with the commission, may the commission legally grant a permit after Aug. 15 to establish a dog racing plant for the purpose of conducting race meetings?

In August of 1954 the state racing commission requested an opinion on the following question:

Must an association or a corporation desirous of obtaining a permit to operate a jai alai fronton under Ch. 551, F. S., file its application with the state racing commission between June 1 and July 1, in accordance with §550.05, F.S., it being not desirous to conduct games for the current year but only being desirous of obtaining a permit for the purpose of submitting the permit for the approval of the electorate at a special election and for the purpose of arranging for the construction of the necessary improvements, in no event it being anticipated that there will be any performance of games prior to the succeeding June 1 to July 1 period, at which time proper application would be made for performance dates?

In our response to that question, opinion 054-207, Aug. 23, 1954, after citing a portion of §550.05, F. S., which provides as follows:

550.05 Application for permit to conduct race meetings.—Between the first day of June and the first day of July of each year, but at no other time, any person possessing the qualifications prescribed in this chapter shall apply to the commission for a permit to conduct race meetings and racing under this chapter. No application thus received by the commission shall be amended after August tenth of each year; and on or before the fifteenth day of August, but not thereafter, of each year, after receipt of any application, the commission shall convene to consider and act upon permits applied for, and all applications not definitely acted upon by the commission on or prior to the fifteenth day of August of each year shall be void. (Emphasis supplied.)

We said:

From a consideration of all the statutes involved, it is clear that a permit to establish a racing plant is quite different to a permit which authorizes any race track to hold a race meet or meeting or for a fronton plant to operate games.

It is necessary for the racing commission to issue permits or licenses yearly to all racing licensees within this state, and in order to give the licensees an opportunity to furnish bonds as required by §550.15, F. S., and give the commission ample time to decide on certain racing dates, it is necessary for the applications for this particular type permit or license (to actually conduct race meetings and racing) to be filed in strict accordance with the provisions of §550.05, F. S., but where an application for a permit to establish a racing plant or jai alai fronton is filed with the commission, it is my opinion that such an application may be filed at any time, provided that the application to actually conduct race meetings or jai alai games at such a plant are filed with the commission at the time set forth in §550.05, *supra*, and at no other time.

However, the supreme court of Florida in the case of *Fronton, Inc. v. Florida State Racing Commission*, 82 So. 2d 520, apparently reversed the legal position of this office taken in this opinion and you have been notified to that effect.

In the *Fronton, Inc.* case the original application for a permit was initially filed in Volusia county but an amendment to said application was filed prior to Aug. 10, 1954, changing the location to Palm Beach county. On Aug. 11, 1954, a permit to operate a jai alai in Palm Beach county was issued. The commission on Dec. 19, 1954, tentatively assigned to *Fronton, Inc.* operating dates of Dec. 16, 1955 to April 10, 1956 for conducting jai alai games in its fronton. When the case was before the supreme court, the court was faced with two questions. One was the constitutionality of a 1955 legislative act. The other was the question of whether or not the permit holder had complied with the provisions of §550.05, *supra*. The supreme court distinguished between an annual operating license and a permit and in distinguishing between the two said:

... it is clear that the statute provides for a renewal of the racing license each year, but does not require a re-application for the permit, and that the quoted provision of Section 550.05, *relates only to the time when an original application for a permit must be made.* (Emphasis supplied.)

The text of the opinion also reads as follows:

... Section 551.12, Fla. Stat. 1953, F. S. A. Section 550.05, Fla. Stat. 1953, F. S. A., insofar as it requires an application for a *dog or horse racing permit* to be made "between the first day of June and the first day of July of each year . . ." is applicable to applications for jai alai permits;" (Emphasis supplied.)

* * * * *

Section 550.05 provides that "Between the first day of June and the first day of July of each year, *but at no other time*, any person possessing the qualifications prescribed in this chapter shall apply to the commission for a permit to conduct race meetings and racing under this chapter. . . ." (Emphasis supplied.)

The language of these statutes is mandatory in terms. The language of the court quoted above construes this statutory language mandatorily. No amendment to the application after the time authorized by law can restore the application to a valid status. The

application had been denied prior to the amendment. The application was amended after Aug. 15. Thus, all proceedings under the amended application were void. Only a new application to be acted upon at the proper time in a subsequent year would have statutory validity.

The court also definitely made a distinction between an annual operating license and an original permit to conduct racing and this distinction cannot and has not been overlooked or disregarded by this office.

Other than the foregoing, there were three original permits issued pursuant to our opinion 054-207, the applications for which were made other than the time set forth in §550.05, *supra*. Of the three, two of the permits were canceled by the electors of the counties involved and the other, Washington county kennel club, was approved. However, an action in quo warranto was filed with reference to the Washington county kennel club permit and the writ was issued and in order to clear up its legal status the legislature in 1957 passed an act ratifying and approving the Washington county kennel club permit.

Under the requirements of §550.05, F. S., as construed by the supreme court in the Fronton, Inc. case the amendments offered to a permit, if any, must be filed on or before Aug. 10 of the year in question and the racing commission must act on the application on or before August 15 and if it does not act upon the application, or application as amended, on or before August 15, the statute provides that the application not acted upon shall be void.

In the instant case the original application was timely filed and one amendment thereto was timely filed. The commission, within the time provided by statute, considered the original application as amended and after having considered the same denied it. This is a final action in so far as the racing commission is concerned and any act by the applicant subsequent to August 10, which purports to be an amendment to the original application, could not be considered by the commission.

From the language used by the supreme court it would appear that the time limits provided in §550.05, *supra*, must be complied with or else the racing commission would not have jurisdiction over the subject matter. This view is bolstered by the provision in the statute that if no action is taken prior to August 15 the application shall be void.

Nothing contained in this opinion is to be construed as having any bearing upon the merits of the present application or any subsequent application. Nor is this opinion to be understood as in anywise affecting the bona fides of a subsequent application duly filed within the time prescribed by law in the ensuing year.

Your question is therefore answered in the negative.

057-384—December 11, 1957

CRIMINAL PROCEDURE

NOLLE PROSEQUI—PAYMENT OF COSTS—§922.01, F. S.

To: *J. Louie Carter, Clerk Criminal Court of Record, West Palm Beach*

QUESTION:

Where the criminal court of record enters a nolle prosequi in a case upon the payment of court costs, does

the clerk of said court have the authority to issue a commitment for such costs or to issue a commitment stating "nolle prosequi upon payment of costs \$_____?"

Since only a prosecuting attorney is empowered to enter a nolle prosequi in a criminal case (*Wilson v. Renfro*, 91 So. 2d 857), I assume that you meant your question to refer to the entry of a nolle prosequi by the county solicitor upon the payment of court costs instead of to the entry of such a nolle prosequi by the criminal court of record.

Without undertaking to pass upon the legal effect of the entry of a nolle prosequi upon the payment of costs, I think that even if such a nolle prosequi may be entered without violating the constitutional or statutory provisions against requiring a defendant to pay costs except in case of conviction, it furnishes no basis for the issuance of a commitment. Section 922.01, F. S., which prescribes when the defendant shall be committed, authorizes such commitment only upon the pronouncement of a sentence which justifies such commitment; it does not authorize the defendant to be committed in the absence of a sentence, and the entry of a nolle prosequi upon the payment of the court costs is in no sense a sentence.

Since a commitment can lawfully be issued only when a sentence has been pronounced which justifies such commitment, and since the entry of a nolle prosequi is not a sentence, the answer to your question is that no commitment may lawfully be issued by the clerk upon the entry of a nolle prosequi, regardless of whether it be entered upon the payment of the court costs or of whether it be entered unconditionally.

057-385—December 11, 1957

INSURANCE

FIRE, TITLE AND CASUALTY INSURANCE COMPANIES— DEPOSITS UNDER §631.06 AS AMENDED BY CH.

57-100—§§626.25 and 665.45, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

Are deposits of a fire, casualty or title insurance company with a federal savings and loan association, evidenced by a savings share account passbook, acceptable as "securities" for the deposit required by §631.06, F. S., as amended by §5, Ch. 57-100?

The savings share account passbook, evidencing \$30,000 in deposits, together with "Power of Attorney for J. Edwin Larson, as Insurance Commissioner," have been delivered to that officer as a part of the deposit required by §631.06, as amended. Hence, we assume without question that the insurer involved is a fire, casualty and/or title insurance company.

The opening words of §631.06(1) are quoted: "Every fire insurance company, title insurance company, and casualty insurance company . . . shall deposit with the insurance commissioner of this state for the protection of all policyholders and creditors securities permitted under §626.25, in the amount of fifty thousand dollars. . . ."

Section 626.25(3), as amended by Ch. 57-100, with respect to voluntary deposits with the insurance commissioner, provides:

"Deposits in solvent banks and building and loan associations chartered by the United States or any state, territory, or insular possession of the United States, or the District of Columbia."

Section 665.45, F. S., provides that insurance companies and others, organized under the laws of Florida are authorized and empowered to invest funds in "investment share accounts of any federal savings and loan association, and in shares of any Florida building and loan association, which is a member of the federal home loan bank system." Reasonably "investment share accounts" and "deposits" as used in §626.25(3) mean the same thing.

The following provision appears in the mentioned passbook: "No assignment or transfer of membership or savings will be recognized by the Association unless made in the manner and form approved by the Association and with its written consent; no responsibility for the validity of any assignment is assumed by the Association."

The mentioned power of attorney appoints J. Edwin Larson, as insurance commissioner, the true and lawful attorney for this insurer "to withdraw, receive and accept any moneys on deposit and registered in the name of (the insurer) under Savings Share Account No. 20915 of the Washington Federal Savings and Loan Association of Miami Beach for the purpose of paying any of the liabilities of (the insurer) as provided for pursuant to and in accordance with Chapter 631, Florida Statutes 1957, giving and granting unto said attorney full power and authority to transfer said monies or any part thereof, . . ." While this power of attorney technically is not an assignment, in effect it grants to the insurance commissioner the power to "transfer . . . savings" within the meaning of such words as they appear in the preceding paragraph.

In view of the foregoing in my opinion the question is answered as follows:

(1) We assume without question that this savings and loan association falls within the definition of such business concerns as set forth in §626.25(3). Subject to the comments set forth in paragraph (2) below, the mentioned power of attorney should be amended to vest in the insurance commissioner full and *exclusive* power and authority to transfer the moneys or any part thereof, here involved; said power of attorney should be approved by this savings and loan association, as provided in the quoted excerpt from the passbook and when the power of attorney has been so amended and approved the passbook evidencing the deposit may be accepted by the insurance commissioner for the purposes stated.

(2) Notwithstanding the statements set forth in the preceding paragraph, we feel that the insurance commissioner with respect to acceptance of a passbook evidencing a deposit, as here dealt with, should refuse to accept any passbook showing a deposit in excess of the maximum amount insured by the established federal agency.

057-386—December 12, 1957

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
SHERIFFS—EQUIPMENT PURCHASED, UNDER CH. 57-368
(§§30.47-30.54, F. S.)—TITLE REGISTRATION OF
AUTOMOBILES**

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

When a sheriff buys equipment from the funds of his office, under Ch. 57-368, or Ch. 145, F. S., and the equipment is required to be registered, in what name should it be registered?

In opinion 056-218 (A. G. O. 1955-1956, p. 747), dated July 31, 1956, I stated that in some instances the sheriff purchases automobiles in his own name and writes off depreciation each year as an expense of his office. This, of course, was a situation where the sheriff was under the fee system.

Under Ch. 57-368, the sheriff in those counties under the act's operation, submits an annual budget which includes equipment. Thus, the county is furnishing the necessary funds to be expended by the sheriff for the equipment necessary to properly perform his official functions. The law does not specify who is to hold title to this property. It is my opinion that when the sheriff expends his funds under Ch. 57-368, he does so as a trustee for the county. The property should be registered therefore in the name of his office, "Sheriff's Office or Sheriff of B County."

Your question is answered accordingly.

057-387—December 12, 1957

INSURANCE

**PREMIUMS, GRADATION BY SIZE OF POLICY—LOWER AGE
RATINGS FOR FEMALES—MORTALITY TABLES—**

§§635.02, 635.175, 635.24, 635.25, 643.04(7), F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTIONS:

1. Does the gradation of gross premiums for ordinary life insurance, according to policy size, constitute discrimination under any statutes of Florida?

2. Does use of a lower age premium rate in ordinary life policies covering female lives constitute discrimination under any statutes of Florida?

We quote from the mentioned letter of this particular insurer: "The level of the premium rate for a life insurance policy will depend on the basic sum insured under the policy (excluding insurance under any rider attached to the policy). Assuming the published premiums or those applicable to policies issued with a basic sum insured less than \$5,000, the following are the premium deductions proposed for life policies:

Sum Insured of Basic Policy	Premium Reduction per 1,000 of Basic Sum Insured	
	Annual Premium Plans	Single Premium Plans
\$5,000 to \$9,999	\$0.60	\$3.60
\$10,000 to \$24,999	\$1.00	\$6.00
\$25,000 or higher	\$1.25	\$7.50

We quote further from said insurer's letter: "Under the Commissioner's 1941 Standard Ordinary Mortality Table, the mortality rate is a minimum at age 11. To determine values under policies issued to females, this table will be used with a three-year age set back to ages 14 and higher. Consequently, the mortality rate at female attained age 14 will be the C.S.O. rate for age 11. For female attained ages 12 and 13, the mortality rate used will also be the C.S.O. rate for age 11. At female attained ages 11 and lower, the mortality rates used will be the C.S.O. mortality rates with no age rating."

We quote one of the forms submitted by this insurer:

MODIFICATION OF RESERVE BASIS (FEMALE)

This policy was modified prior to its execution by striking from the PRIVILEGE OF EXCHANGE WITHOUT MEDICAL EXAMINATION and from the *Reserve Liability Maintained by Company* provision the words "Commissioners 1941 Standard Ordinary Mortality Table" and by substituting therefor the words "Commissioners 1941 Standard Ordinary Mortality Table with the age set back three years."

Section 635.02, F. S., provides in effect and for instant purposes that no life insurer doing business in this state "shall make or permit any distinction or discrimination between insureds of the same class and equal expectation of life as to the amount or payment of premiums or rates charged for policies of life or endowment insurance" and for other described benefits. For statutory exceptions see §635.24-635.25, F. S. Section 643.04(7), F. S., declares, among other things, as an unfair method of competition and an unfair or deceptive act or practice discrimination in rates, benefits, etc., in wording approximating the provisions of said §635.02. Certain exceptions to these provisions appear in §643.04(8) (b), F. S.

Section 635.175, F. S., as amended by §2 of Ch. 57-33, requires the filing with and approval by the commissioner of forms of life insurance policies or application forms in those instances where the latter are required and are made parts of the respective policies to which they pertain. Section 635.175(4) provides that the commissioner may disapprove any such policy form or application or withdraw previous approval thereof (a) if such is in violation of or fails to comply with our insurance laws; (b) if it has any title, heading or other indication of its provisions which are misleading; (c) if any material part of the policy is printed in type substantially illegible.

In view of the foregoing, in our opinion the questions are answered as follows:

1. The matter of gradation of premiums in relation to policy amount has received attention of the national association of insurance commissioners. Attention is directed to the report of the life insurance committee of said organization appearing in Vol. II, 1956 Proceedings, National Ass'n of Insurance Commissioners, pp. 354-394; and particular attention is directed to the report and recommendations of the special policies, subcommittee of life appearing in the mentioned report of the life insurance committee on pp. 388-394 of said Vol. II, 1956 Proceedings. The following paragraph is quoted from the mentioned subcommittee's lengthy and informative report:

In conclusion, it is the sub-committee's recommendation that

1. It is in the best interest of the insuring public to recognize that life insurance companies, which desire to do so, may graduate their premiums or dividends by policy size for the principal plans of insurance, subject to the responsibility on their part to show that any system of groupings of premium rates or dividend classifications is reasonable, equitable and non-discriminatory.

2. Any differential in premium rates charged for any special policy, or in dividends paid thereon, should be justified on the basis of a demonstrated differential in expense, mortality or other relevant factors.

The complete report of said life insurance committee was adopted by the mentioned organization.

In my opinion the insurance commissioner will be authorized to permit gradation of premiums generally within the standards set forth in the above-quoted recommendations of said subcommittee, based upon credible data furnished relating to costs involved; and such will not violate any of our insurance laws relating to discrimination.

2. It is recognized from available credible sources that experience data accumulated by life insurers demonstrates that female mortality has declined more than male mortality during the last several years. One of the best dissertations furnished us concerning this subject is found in the 1957 Eastern Spring Meeting Number, Transactions Society of Actuaries. Remarks of a representative of one of the larger life insurance companies, as reported in this publication (p. 62) on this subject of decrease in mortality during the last 20 years is highly instructive and generally we believe typical: male mortality under standard ordinary policies has declined about 30% at ages 15 to 19, about 40% at ages 20-24, about 20% at 45-54, about 15% at ages 55 and over. Female mortality has decreased about 50% at attained ages 15-19, about 60% at ages 20-24, about 50% at ages 45-64 and about 40% at ages 65 and over.

We have no specific laws relating to approval by the commissioner of premium rates for ordinary life insurance as we do for fire and allied lines (Ch. 629) or casualty, etc. (Ch. 630); neither do we have laws giving to the commissioner power to control rates with respect to ordinary life policies as indirectly vested in him with respect to sick and accident policies (§642.01, F. S.). To date there has been no table prepared and generally accepted setting forth separate mortality experience of males and females for use in connection with ordinary life coverages.

We are informed that there are several practical problems in connection with the set-back in age for females; that the states of California, Oregon, Missouri, Washington, New Jersey and Maryland hold that the minimum values under standard non-forfeiture adjusted premium method must be determined by using the C.S.O. table with true age and rate of interest specified in the contract for nonforfeiture values; that Maryland prefers separate policy forms for females; that Texas holds that until a table is specifically promulgated for females and adopted the assumption must be that male and female mortality is identical since the only formal table is the C.S.O. table which does not recognize any sex differential (1957 Western Spring Meeting

Number, Transactions Society of Actuaries).

It appears that until an ordinary mortality table for female lives is specifically promulgated and adopted that the recognized ordinary mortality tables for use in Florida do not provide for a set-back in age for female lives.

There is here immediately involved the matter of gross premiums. However, there is also involved the matter of net premiums and acceptable reserves as required by §635.10, F. S. Hence, until there is made available a recognized and approved ordinary mortality table for females, it is recommended that the application for issuance of ordinary coverage on female lives as reflected in this question, be denied.

057-388—December 17, 1957

EDUCATION

DISCIPLINING OF STUDENTS RELATIVE TO TRAFFIC VIOLATIONS—COOPERATION WITH JUVENILE AUTHORITIES—§§39.02, 39.03, and 232.25, F. S.

To: *Thomas D. Bailey, Superintendent Public Instruction, Tallahassee*

QUESTIONS:

1. In the event of a traffic violation by a juvenile enrollee while on the way to or from a public school, would it be in violation of §39.03, F. S. or any other Florida Statute should a report by the municipal police of such violation and subsequent disciplinary action be handled with and by the principal of the school in which the pupil is enrolled?

2. Under §232.25, F. S., is a school principal limited in his authority to the disciplining of students for misconduct such as traffic violations on the way to and from school?

Section 39.03, F. S., provides in part:

(1) No child shall be taken into custody without an order of the judge of the juvenile court of the county or district wherein the child is found, living, or domiciled, unless (a) the child is in such condition or surroundings that the welfare of the child requires that the child be immediately taken into custody, or (b) the child shall be alleged to have committed a violation of law. In case either of these special circumstances shall exist, any law enforcement officer whose duty it would be to do so if the child were an adult, and any counselor or assistant counselor, may take the child into custody without order of the judge.

(2) Unless otherwise ordered by the judge, the person taking the child into custody shall, whenever practicable, release the child to a parent or legal custodian of the child upon agreement of the parent or legal custodian to produce the child in juvenile court at such time as the court may direct, and shall forthwith make a full written report to the court, stating the facts by reason of which the child was taken into custody.

(3) The person taking and retaining a child in custody shall notify the parents or legal custodians of the

child at the earliest practicable time, and shall, without delay for the purpose of investigation or any other purpose, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody, or, if the judge has so ordered, to a detention home or licensed child caring institution or county or city jail, within the county or district designated by the judge, and shall at the earliest practicable time report in writing to the court the facts by reason of which the child was taken into custody. The child shall not under any circumstances be placed in any police or other vehicle which at the same time contains an adult under arrest, nor in a jail, police station, or other place of detention, except on general or special order of the judge; providing, however, where the child is involved in the same offense or transaction with adults, then such child may be transported in the same vehicle with the adults so involved.

Section 39.02(1)(a) provides in part:

The judge of any juvenile court, after filing of a petition and holding a hearing as hereafter provided, may revoke or suspend the driver's license of a child upon such judge finding that the child has violated a federal law, state law, or city ordinance relating to the operation of a motor vehicle; . . .

Section 232.25, F. S., provides:

Subject to law and rules and regulations of the state board and of the county board, each pupil enrolled in a school shall, during the time he is being transported to or from school at public expense, during the time he is otherwise en route to or from school, during the time he is attending or is presumed by law to be attending school, and during the time he is on the school premises, be under the control and direction of the principal or teacher in charge of the school, and under the immediate control and direction of the teacher or other member of the instructional staff or of the bus driver to whom such responsibility may be assigned by the principal.

In my opinion the above cited statutory provisions should be considered together in answering your questions. I do not believe there is any conflict between the provisions or intent of these statutory provisions or that there is any overlap or conflict in the authority delegated by law to juvenile courts and to school authorities. The statutes do contemplate a high degree of cooperation between public officials, including police officers, juvenile courts and school authorities in their respective duties and authority relating to the welfare of children in general and juvenile offenders in particular.

It seems clear that the legislature intends to place exclusive responsibility on juvenile courts for the care and punishment of all juvenile offenders taken into custody by law enforcement officers and for the disposition of such cases. Such responsibility on the part of juvenile courts includes traffic offenses and specific authority is given juvenile courts to revoke or suspend driver's licenses of children who violate traffic laws relating to the operation of motor vehicles.

On the other hand, the school code, in §232.25, which is design-

ed for an entirely different purpose and relates primarily to the maintenance of discipline and good order of children enrolled in public schools, delegates certain duties and responsibilities to school officials over children entrusted to their care. This responsibility and authority exists by virtue of §232.25, not only while pupils enrolled in public schools are in attendance at the schools, but extends beyond the school grounds while children are actually en route to or from school from their homes. I do not believe that this section is intended to place upon the school officials any responsibility in determining the guilt or innocence of children charged with traffic offenses or any other infraction of the law. Such responsibility is the sole prerogative of juvenile courts and if a police officer takes a child into custody his duty is to proceed under the provisions of Ch. 39 and either deliver the child to the child's parents or to the juvenile court. In either event, it is the duty of the arresting officer to make his official report of the incident to the juvenile court. It would seem, however, that in cases where the arresting officer does not consider an arrest necessary, and therefore, does not take the child into custody, that it would be proper for him to report the incident to the principal of the child's school if he believes that the principal should be made aware of the child's actions for school disciplinary purposes.

Even in cases where the child is actually taken into custody and delivered to the juvenile court as provided in Ch. 39, I know of no reason why the action could not be reported to the school principal if the arresting officer saw fit to do so and if his report did not include records which are required to be confidential as provided by §39.03. I believe that the school principal is authorized to take such reasonable disciplinary action as may be lawfully provided in cases where the maintenance of proper school discipline is involved but that the principal has no authority to suspend or revoke the driver's license of a pupil since this power is reserved exclusively for the juvenile courts.

In other words, the duty and authority of school officials, as provided by §232.25, F. S., relates solely to the control of pupils enrolled in the school for the purpose of maintaining an orderly school program in the interest and for the welfare of the pupils themselves. This authority and duty is not to be confused with punishment for criminal offenses or infractions of the law of such a serious nature that it is necessary for an arresting officer to take the child into custody and deliver him to the juvenile courts as provided in Ch. 39. Discipline for school purposes is not intended in law to be substituted for the enforcement of criminal laws.

Your 1st question is therefore answered in the affirmative, subject to the above comments, limitations and reservations.

Your 2nd question has been answered, at least in part, by the above comments. Answering your question specifically, it is my opinion that §232.25, F. S., gives school officials authority to maintain discipline among pupils enrolled in the school, not only while actually on the school premises, but during the time when they are en route to and from school. Infractions of school board rules and regulations by pupils during such times or disobedience of reasonable directions of school bus drivers or teachers may properly be dealt with by school officials by appropriate disciplinary action, including suspension of the pupil from school when necessary and in the best

interest of the pupil and the school, within the limitations provided by law.

A school principal has no authority to determine the guilt or innocence of juvenile offenders who are taken into custody by law enforcement officers and charged with criminal offenses. He may, however, enforce reasonable rules of conduct of pupils enrolled in his school by such disciplinary action as may be authorized by law and school board regulations during the time the pupil is attending school or is en route to or from the school.

Your 2nd question is therefore answered in the affirmative, subject to the above observations.

057-389—December 19, 1957

CRIMINAL PROCEDURE

SENTENCES, INDETERMINATE—DISCRETION OF COURT AS TO LENGTH OF TERM

To: *Roy H. Amidon, Judge, Criminal Court of Record, Bartow*
QUESTION:

When imposing an indeterminate sentence under the provisions of Ch. 57-366, does the sentencing court have any discretion as to the minimum and maximum terms of imprisonment to be imposed?

The 1957 legislature enacted an indeterminate sentence law, Ch. 57-366, which allows the sentencing court in its discretion to impose an indeterminate sentence for a noncapital felony. Section 2 of said chapter reads as follows:

Whenever any person is convicted of a noncapital felony and the court determines that the defendant should not be placed on probation and should not be fined as the sole punishment, but should be sentenced to a term of confinement, the court within its discretion, in imposing sentence, may sentence such person to the custody of the department for an indeterminate period of six months to the maximum period of imprisonment authorized by law for the felony of which such person was adjudged guilty. The form to be used by the court in sentencing such defendants convicted of noncapital felonies shall read substantially as follows:

"IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED, that you be imprisoned by confinement and committed to the custody of the department of corrections for a term of six months to (here insert the maximum penalty as provided by law.)"

My construction of said §2 is that it authorizes the sentencing court to impose only one type of indeterminate sentence, that is to say, a sentence for an indeterminate period of six months to the maximum period of imprisonment authorized by law. It authorizes the court, in its discretion, in noncapital felony cases, to sentence the defendant "for an indeterminate period of six months to the maximum period of imprisonment authorized by law for the felony of which such person was adjudged guilty," and the form of sentence set out therein specifically provides for just such a sentence and no other when an indeterminate sentence is imposed.

Therefore, I do not think that the sentencing court has any authority to fix the minimum sentence at more than six months or to fix the maximum sentence at less than the maximum provided by law. For example, in imposing an indeterminate sentence for grand larceny, my construction of said statutory provision is that it requires the imposition of a minimum of six months imprisonment and a maximum of five years imprisonment, with no discretion vested in the court to increase the minimum or decrease the maximum.

I understand that in some states the sentencing court is authorized by statute to fix the minimum term of imprisonment when imposing an indeterminate sentence, but such is not the case in Florida because of the above quoted statutory provision.

Therefore, it is my opinion that your question is properly answered in the negative.

057-390—December 19, 1957

CRIMINAL PROCEDURE

SENTENCES—EFFECT OF INDETERMINATE SENTENCE
LAW, §§921.17-921.23 (CH. 57-366)—CHS. 57-121,
57-213, AND 57-317

To: *Edward L. Garnett, Attorney, Tampa*

QUESTIONS:

1. Does the commitment to the department of corrections under §§921.17-921.19, F. S., have the same effect as commitment to Raiford?

2. Inasmuch as the term of commitment to the department of corrections is indefinite, what effect would the indefinite term of commitment under §921.18 have upon the length of sentence?

AS TO QUESTION 1:

Section 921.18, being the same as §2 of Ch. 57-366, sets out the form to be substantially followed in imposing an indeterminate sentence for a noncapital felony. Said form provides that the defendant be committed to the custody of the department of corrections for an indeterminate period of six months to the maximum penalty provided by law. When an indeterminate sentence is imposed upon a defendant under this statutory provision, as well as when he or she is sentenced to the state prison for a definite term in a noncapital felony case, he or she is delivered into the custody of the division of corrections, which may place him or her in any appropriate institution in the state correctional system. (It appears that the "department of corrections" referred to in said Ch. 57-366, and in Chs. 57-121 and 57-213, is the same as the "division of corrections" provided for by Ch. 57-317, because §1 of Ch. 57-317 provides for the setting up of a "division of corrections" and §1(1-d) of said chapter prescribes that in any separate measure "enacted by this legislature" wherein may be provided a "department of corrections" with like responsibilities and objectives the use of the term "department of corrections" shall mean "division of corrections.")

Section 921.19, being the same as §3 of Ch. 57-366, provides as follows:

921.19 Commitment to and confinement by corrections department.—In every case where any person is convicted of a noncapital felony and is sentenced in accordance

with the provisions of this act, he shall be committed and conveyed in a manner provided by law to the custody of the department to a reception and classification center, and upon arrival it will be the duty of the classification board of the department to determine in which correctional institution the prisoner will be confined; this determination shall be made with the express purpose of placing every prisoner in a penal environment that is best suited to effect a rapid rehabilitation; and it shall be the duty of said classification board to consider the criminal, personal, social and environmental background and such other aspects as found necessary in making this determination."

and §6(1) of Ch. 57-121, provides as follows:

Section 6 . . . (1) The words "penitentiary" or "state prison farm," whenever the same are used in any of the laws of this state, as a place of confinement or punishment for a crime, shall be construed to mean and refer to the custody of the department within the state correctional system.

and §9 of Ch. 57-213 provides as follows:

Section 9. All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the department and shall be conveyed in the manner provided by law to such institution in the correctional system as the department shall direct. The department shall establish a reception and classification center for male prisoners at the State Prison at Raiford. The department shall provide reception and classification facilities for female prisoners at the Florida Correctional Institution at Lowell. Classification facilities shall be provided in the discretion of the department at all institutions in the correctional system. Classification of prisoners shall be made by a board or boards designated by the Board of Commissioners of State Institutions. Pursuant to such regulations as the board may provide, the department is authorized to transfer prisoners from one institution to another institution in the correctional system and to reclassify prisoners as circumstances may require.

It appears from these statutory provisions that when an indeterminate sentence is imposed in a noncapital felony case, it is for the division of corrections to designate the correctional institution in which the defendant shall be confined, whether in the state prison at Raiford or at some other institution in the state correctional system. In this connection, I note that §§2, 3, 4 and 5 of Ch. 57-121 provide that there shall continue to be a Florida state prison for men at Raiford, a Florida state prison farm for men at Belle Glade, an Apalachee correctional institution in Jackson county for certain youthful male offenders, and a Florida correctional institution for women at Lowell; and that §1(1)(a) of Ch. 57-317 provides as follows:

Section 1 . . . (1)(a) The division of corrections shall have supervisory and protective care, custody and control of the inmates, buildings, grounds, property and all other matters pertaining to the following institutions for the imprisonment or correction of adult offenders:

1. State prison farm at Raiford,

2. State correctional institution at Lowell,
3. Apalachee correctional institution,
4. Glades state prison farm,
5. Florida farm colony prison camp at Gainesville,
6. Florida industrial school for girls prison camp at Ocala,
7. Chattahoochee construction camp,
8. State convict road force camps.

AS TO QUESTION 2:

When an indeterminate sentence is imposed for a noncapital felony the prisoner must serve at least six months and may be required to serve the maximum term imposable by law as, for example, five years for grand larceny, but it is also possible that he may be either paroled or finally discharged prior to the expiration of such maximum term under the following provisions of §§921.21 and 921.22, being the same as §§5 and 6 of Ch. 57-366:

921.21 *Progress Reports to Parole Commission.*—

... When in the opinion of the classification committee, based on its findings, as provided by this act, the ends of justice, the interests of society, and public welfare shall best be served, and with due regard to the deterrent effect of the example to others who may be like offenders, the classification committee of the department shall recommend to the parole commission, and said commission shall have the power to either place the said prisoner on parole, as provided by law, or to finally discharge the prisoner from custody. If the prisoner is placed on parole, the period of parole shall be discretionary with the parole commission.

921.22 *Determination of Exact Period of Imprisonment by Parole Commission.*—The parole commission upon the recommendation of the department shall have the authority to determine the exact period of imprisonment to be served by such defendants sentenced under the provision of this act; provided, however, that the prisoner shall not be held in custody longer than the maximum sentence as provided by law.

It appears from said provisions of §§921.21 and 921.22 that the question of whether the prisoner is to be paroled or finally discharged prior to the expiration of the maximum term of imprisonment allowable by law depends upon whether the ends of justice, the interests of society and the public welfare would best be served by such parole or discharge, taking into account the deterrent effect of the example to other like offenders.

057-392—December 23, 1957

PUBLIC BUSINESS

DISPOSITION OF FUNDS COLLECTED BY STATE AGENCIES—SALE OF LABORATORY BY STATE BOARD OF HEALTH—§§282.001, 282.002 AND 381.171, F. S.

To: Harry G. Smith, Budget Director, Tallahassee

QUESTION:

Can the state board of health sell the laboratory and property which it presently owns in Pensacola and set aside the proceeds of such sale to be matched with federal funds to be applied toward the construction of a modern laboratory at a new location within that city?

The answer to this question apparently turns on the construction of §§282.001 and 381.171, F. S. Section 282.001 (3), F. S., says:

282.001 *Continuing appropriations repealed.*— . . .

(3) *Except as otherwise provided by §282.002 all funds collected by the institutions under the management of the state board of control and the board of commissioners of state institutions to the extent as now required by law, and all funds collected by all other officials, officers, commissions, departments, boards, bureaus, divisions or other agencies of the state government from taxes, licenses, fees and every other source whatsoever, shall be promptly deposited in the general revenue fund, . . . (Emphasis supplied.)*

Section 282.002, F. S., as mentioned in §282.001 (3) F. S., quoted above says:

282.002 *Exceptions.*— . . .

(27) The deductions authorized by §§215.20-215.25.

Section 215.24, F. S., one of the sections mentioned in §282.002

(27), F. S., says:

215.24 *Exemptions where federal contributions.*—

(1) Should any state fund be the recipient of federal contributions, either by the matching of state funds or by a general donation to state funds, and the payment of moneys into the general revenue fund under this law should cause such fund to lose federal assistance, the governor shall certify to the comptroller and to the state treasurer that said fund is for that reason exempt from the force and effect of this law.

It appears from these three sections of the statutes, quoted above, that the proceeds of the sale of the laboratory property should be deposited in the general revenue fund to be disbursed by appropriation unless matching federal funds will be lost in which case the proceeds could presumably be matched with federal funds for immediate use. These sections quoted above should, if possible, be read in *pari materia* with the following section of the state board of health chapter 381 of the Florida Statutes. Section 381.171, F. S., says:

381.171 *Purchase, lease and sale of real property.*—

(1) The board may purchase, lease or otherwise acquire land and buildings and take a deed thereto in the name of the state, *for the use and benefit of the board*, subject to available appropriations therefor, when the acquisition is necessary to the efficient accomplishment of the purposes of this chapter.

(2) The board may sell, lease or convey in the name of the state *for the use and benefit of the board, any land and buildings owned by the state for the use and benefit of the board which lands and buildings are no longer necessary for carrying out the purposes of this chapter.*

(3) Title is confirmed in the board to any real estate which has heretofore been conveyed or attempted to be conveyed to the board. (Emphasis supplied.)

A close reading of §381.171, F. S., reveals that reconciliation between it and the above quoted parts of §§282.001, 282.002 and 215.24, F. S., it is impossible unless matching federal funds will be lost, therefore, §381.171, F. S., enacted in 1955, being the later expression of the legislature should, according to the rules of statu-

tory construction, be controlling.

Section 381.171(3), F. S., is the former §381.71 and was discussed in A. G. O. 047-224, 1947 B. R., p. 413, however, the question presently under discussion was not decided at that time and the addition of §§381.171 (1), (2) gives the board of health much wider latitude in such manners than was authorized under the old section.

Inasmuch as §381.171 (2) Florida Statutes, authorizes the board to sell or convey for the *use and benefit* of the board any land or buildings owned by said board it appears to me that the proceeds from the sale of state board of health properties may be used by the board without being returned to or appropriated from the general revenue fund.

Section 216.08, F. S. requires the state budget commission to survey all state agencies, §216.17, F. S., requires expenditures for acquisition of property to be submitted to the state budget commission and §216.20, F. S., requires the state budget commission to approve all requests for federal funds. Therefore, the program discussed herein should be submitted to and coordinated with the state budget commission so that a proper accounting of the funds involved can be made.

The question as set out above is answered in the affirmative.

057-393—December 31, 1957

PUBLIC LANDS AND PROPERTY

SALE OF SUBMERGED LANDS—REQUIREMENT FOR ADVERTISING—CH. 57-362 (§§253.122-253.14, F. S.)

To: *Van H. Ferguson, Director, Trustees Internal Improvement Fund, Tallahassee*

QUESTION:

Must conveyances authorized by the last two paragraphs of §1 of Ch. 57-362, be advertised for objection?

The last paragraph of §1 of the act provides:

When any person, state agency, county, city or other political subdivision has heretofore extended or added to existing lands or islands bordering on or being in the navigable waters as defined in Section 253.12 herein by filling in or causing to be filled in such lands the Trustees of the internal improvement fund shall upon application therefor convey said land so filled to the riparian owner or owners of the upland so extended or added to. The consideration for such conveyance shall be the appraised value of said lands as they existed prior to such filling.

In order to reconcile this provision with §9 of the act, which provides:

Provided, however, the title to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each such owner.

I held in opinion 057-215, dated July 30, 1957, that §9 applies only to those counties under the purview of the Butler act. Thus, since the enactment of Ch. 26776, 1951, §9 applies only to Dade and Palm Beach counties. I also held in the above opinion that the last paragraph of §1 applies to all counties except Dade and Palm Beach.

The last paragraph of §1 thus provides that in all filled lands not within the purview of the Butler act, prior to the enactment of Ch. 57-362, the trustees *shall* upon application convey to the upland owner. This appears to be a mandatory provision and advertisement for protests would be of no effect. It is my opinion that when application is made for lands filled prior to the passage of this chapter, and the applicant proves that he is the upland owner, no advertisement is necessary.

The next to last paragraph of §1, provides:

When any state agency, county, city or other political subdivision extends or adds to existing lands or islands bordering on or being in the navigable waters as defined in §253.12 herein of the state by filling in or causing to be filled in or by draining or causing to be drained such waters the trustees of the internal improvement fund may, upon application therefor, convey to the riparian owner or owners of the upland so extended or added to, without consideration, so much of such extended or added land as is not required exclusively for a municipal, county, state or public purpose. The trustees may, however, require a deposit to accompany such application of a sum sufficient to cover the actual cost and expenses of processing such application and preparing instruments of conveyance.

This paragraph provides for a conveyance without consideration in the discretion of the trustees. It contemplates a situation where a political subdivision has completed filling operations upon the submerged lands in front of private property. I held in opinion 057-362, dated Nov. 18, 1957, that when a political subdivision proposes filling operations either as the upland riparian owner or with the consent of the upland riparian owner, no notice is required. I based this opinion upon §6 of the act, which in part provides that the act:

... shall not apply if such construction or extension is by any state, county, or city or other political subdivision exclusively in a governmental or proprietary capacity for a municipal, county, state, or public purpose, of lands of which it is the riparian upland owner or holds the consent in writing of the riparian upland owner consenting to such construction or extension;

To allow a riparian owner to now purchase fill which was the result of a political subdivision's operation would effectually permit him to purchase submerged lands without allowing an adjoining riparian owner an opportunity to object, and thus defeat the purpose of the advertising requirement of the act.

It is, therefore, my opinion that under this paragraph advertisement prior to sale is required.

Your question is answered accordingly.

057-394—December 31, 1957

CORRECTION SYSTEM

**OVERCROWDED JAIL—TRANSFER OF PRISONERS TO JAIL
IN ANOTHER COUNTY—§§950.01, 950.02, 951.12 AND
951.13, F. S.**

*To: John A. Madigan, Jr., Attorney, Florida Sheriffs Association,
Tallahassee*

QUESTION:

**When and under what circumstances may a prisoner
in an overcrowded jail be transferred to a less crowded
jail of another county?**

The sections of the Florida Statutes which should be examined in connection with your question are, §§951.12, 951.13, 950.01 and 950.02.

Section 951.12, F. S., provides that when there are less than five prisoners in a county jail, the county commissioners may arrange with the county commissioners of another county for an exchange of prisoners. This statute does not, however, grant to the county commissioners authority in the overcrowded situation which you pose.

Section 951.13, F. S., provides that upon the application of the county commissioners of a county which has made provision for working more prisoners than it can supply, the county commissioners of any other county which has not provided work for all of its prisoners, shall deliver to said county prisoners confined in the county jail. The cost of guarding and maintaining these prisoners is the expense of the county requiring them, and the statute requires that a contract shall have been entered into by the board of county commissioners and arrangements made for the prisoners' safekeeping, proper care, and safe return to the county from which such prisoners were sentenced. This gives authority to the board of county commissioners to enter into contracts with other boards of county commissioners, to effectuate an exchange where additional prisoners are required for work on public roads. This statute might be used to accomplish a reduction of overcrowded jails, by entering into a contract with a county requiring additional prisoners for such work. However, under the provisions of this section, the county obtaining the additional prisoners must pay the expenses incurred.

Section 950.01, F. S., permits the court when passing sentence, upon a determination that there is no jail in the county suitable for confinement, to order sentence executed in any county in the state where there is a suitable jail, and the expense of supporting the prisoner shall be borne by the county where the offense was committed.

Under this section, it is my opinion that when overcrowded conditions make it imperative that prisoners be committed to another jail, the court can require that the sentence be executed in another county. The expenses incurred in this instance would be borne by the county in which the crime was committed.

Section 950.02, F. S., which deals with removal of prisoners under criminal charge, is not applicable to your situation.

I am unable to find any statutory authority for the transfer of prisoners upon agreement between the sheriffs of the various

counties.

Your question is answered accordingly.

057-395—December 31, 1957

CRIMINAL PROCEDURE—DIVISION OF CORRECTIONS
FORM OF COMMITMENT PRESCRIBED BY 1957 LEGISLA-
TURE—CHS. 57-317, 57-213, 57-121 AND 57-366—§§945.01(4);
945.09; 945.02(2), (3), (6); 944.08; 944.16-944.18;
921.18 AND 921.19, F. S.

To: R. O. Culver, Director, Division of Corrections, Tallahassee
QUESTION:

Will you prepare and supply the division with a commitment form for state-wide use that will comply with the requirements of laws enacted by the 1957 legislature concerning the state correctional system?

Chapter 57-213, creating a "Department of Corrections," lays down the following definition to be applied to said chapter:

Department: Wherever the word "department" or the phrase "department of corrections" is used in this act it shall mean the division of corrections under the board of commissioners of state institutions.

and §9 of said chapter reads as follows:

Section 9. All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the department and shall be conveyed in the manner provided by law to such institution in the correctional system as the department shall direct. The department shall establish a reception and classification center for male prisoners at the state prison at Raiford. The department shall provide reception and classification facilities for female prisoners at the Florida correctional institution at Lowell. Classification facilities shall be provided in the discretion of the department at all institutions in the correctional system. Classification of prisoners shall be made by a board or boards designated by the board of commissioners of state institutions. Pursuant to such regulations as the board may provide, the department is authorized to transfer prisoners from one institution to another institution in the correctional system and to reclassify prisoners as circumstances may require.

Chapter 57-121, gives certain powers to the "Department of Corrections" and its director and sets forth the following definitions to be applied to said chapter:

"Correctional system" means all prisons and other state correctional institutions now existing or hereafter created under the jurisdiction of the department.

"Department" means the department of corrections.

"State correctional institution" means any prison, road camp, prison industry, prison forestry camp, or any prison camp or prison farm or other correctional facility, temporary or permanent, in which prisoners are housed, worked or maintained, under the custody and jurisdiction of the department.

and §§6(1), 14, 15 and 16 of said Ch. 57-121 read as follows:

Section 6. . . . (1) The words "penitentiary" or "state prison" or "state prison farm," whenever the same are used in any of the laws of this state, as a place of confinement or punishment for a crime, shall be construed to mean and refer to the custody of the department within the state correctional system.

Section 14. Prisoners; how received.—All prisoners shall be delivered to the custody of the department at such reception and classification centers as shall be provided by the board for this purpose. No prisoner shall be received by the department, unless the sheriff, United States marshal, or other officer having such prisoner in charge, shall also deliver a commitment in due form issued by authority of the court committing such prisoners.

Section 15. Uniform commitments to department.—The director of the department shall design and supply to the several clerks of the courts a uniform commitment to be used by said clerks in the issuing of commitments to the department of all persons who may be convicted and sentenced in their respective courts. No prisoner shall be received into the custody of the department by other commitment form.

Section 16. Copies of indictments to be transferred to director.—When any person has been convicted of any criminal offense in this state and is sentenced to serve any term under the custody of the department, the clerk of the court in which such person is convicted shall, with the commitment of such person, transmit to the department a certified copy of the indictment or information upon which such person shall have been convicted, and such copy of the indictment or information shall be kept on file in the office of the director, at Tallahassee.

Chapter 57-366 permits the imposition of indeterminate sentences to the custody of the "Department of Corrections" in non-capital felony cases and defines "Department," as used therein, as meaning "Department of Corrections." Sections 2 and 3 thereof read as follows:

Section 2.

921.18 *Sentence for indeterminate period for non-capital felony.*—Whenever any person is convicted of a noncapital felony and the court determines that the defendant should not be placed on probation and should not be fined as the sole punishment, but should be sentenced to a term of confinement, the court within its discretion, in imposing sentence, may sentence such person to the custody of the department for an indeterminate period of six months to the maximum period of imprisonment authorized by law for the felony of which such person was adjudged guilty. The form to be used by the court in sentencing such defendants convicted of noncapital felonies shall read substantially as follows:

"It is further considered, ordered and adjudged, that you be imprisoned by confinement and committed to the custody of the department of corrections for a term of six months to (here insert the maximum penalty as provided by law.)"

Section 3.

921.19 *Commitment to and confinement by correc-*

tions department.—In every case where any person is convicted of a noncapital felony and is sentenced in accordance with the provisions of this act, he shall be committed and conveyed in a manner provided by law to the custody of the department to a reception and classification center, and upon arrival it will be the duty of the classification board of the department to determine in which correctional institution the prisoner will be confined; this determination shall be made with the express purpose of placing every prisoner in a penal environment that is best suited to effect a rapid rehabilitation; and it shall be the duty of said classification board to consider the criminal, personal, social and environmental background and such other aspects as found necessary in making this determination.

Chapter 57-317 provided for a "Division of Corrections" and §1(1-d) thereof reads as follows:

The provisions of this subsection shall be cumulative of and shall not be construed to replace any *separate measure enacted by this legislature* wherein may be provided a department of corrections with like responsibilities and objectives. *In any such separate measure the use of the term "department of corrections" shall mean "division of corrections."* (Emphasis supplied.)

By reason of said provision of Ch. 57-317, the term "Department of Corrections," as used in the other statutory provisions which are quoted above, means "Division of Corrections." (The above quoted definition of "Department" which is found in Ch. 57-213 also provides that "Department" and "Department of Corrections," as used in said chapter, shall mean "Division of Corrections.")

Under the foregoing statutory provisions, all commitments of defendants to serve terms of imprisonment in state correctional institutions should commit such defendants to the custody of the division of corrections. When all of the said statutory provisions are considered together, it is my opinion that the following form of commitment would meet their requirements, viz.:

(TO BE USED IN COMMITTING DEFENDANTS UNDER INDETERMINATE SENTENCES AS WELL AS UNDER SENTENCES OF IMPRISONMENT FOR DEFINITE PERIODS.)

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

(Court)

County. _____ Term, 19_____
Conviction for _____
(Offense)
Date of conviction _____
Date sentence imposed _____
Term of sentence _____

STATE OF FLORIDA,
Plaintiff,

vs.

Defendant.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of _____ (Indictment) _____ (Information) _____, judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable _____, Judge of said Court, as also _____, Clerk, and the Seal thereof, this the _____ day of _____, 19—.

(SEAL)

Clerk of said Court

If you should adopt the foregoing form as the uniform commitment which §15 of Ch. 57-121 requires you to design, it is my opinion that it will be the duty of all clerks of circuit courts and criminal courts of record, and of the clerk of the court of record of Escambia county, to use said form, and no other, when issuing commitments to the custody of the division of corrections, regardless of whether the sentences be for fixed periods of imprisonment or whether they be for indeterminate periods.

In fact, upon your adoption of said form as a uniform commitment, a prisoner cannot lawfully be accepted into the custody of the division of corrections for confinement in the state correctional system under any other form of commitment (see §15 of Ch. 57-121, quoted above).

058-1—January 2, 1958

COUNTY FINANCES

MILEAGE FEES AUTHORIZED FOR SHERIFFS FOR TRANSPORTATION OF PRISONERS TO RAIFORD

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When a sheriff transports two prisoners to Raiford at the same time, is said sheriff entitled to a mileage fee for each prisoner?

According to the holding in the case of Traylor v. State ex rel., Coleman, Sheriff, 151 Fla. 322, 9 So. 2d 417 and A. G. O. 043-131 (unofficial), 1943 B. R. pp. 120-1, multiple mileage fees are authorized. As pointed out in A. G. O. 050-265, 1950 B. R. p. 630, the above comments are made on the assumption that a sheriff

would not abuse the privilege of transporting prisoners to incur unnecessary expense on the part of the county. It is also assumed that the sheriff under discussion is not affected by the sheriff's budget law, enacted by the 1957 legislature.

A representative of the state auditor's office advises that it has been a long established policy of that office to condone the multiple mileage fees inquired about above. The rulings of other state agencies have considerable persuasive force and influence upon the opinions of this office in the light of *Smith Aircraft Corp. v. Green*, Fla. 94 So. 2d 832.

In the light of the above discussion, A. G. O. 043-131, rendered unofficially by my predecessor, is reaffirmed officially and the above question is answered in the affirmative notwithstanding the conclusion of A. G. O. 045-160, 1945 B. R., p. 116, to the contrary rendered by my predecessor which is hereby rescinded.

058-2—January 2, 1958

REGULATION OF PROFESSIONS AND VOCATIONS

FLORIDA WATCHMAKERS COMMISSION—MILEAGE AND
PER DIEM—MEMBERS AS EMPLOYEES—§§489.03(2)
AND 112.061(1), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are members of the Florida watchmakers commission entitled to the per diem and mileage allowance prescribed for state officers and employees by §112.061(1), F. S.?

2. May a member of the Florida watchmakers commission act in the dual capacity as an employee of the commission?

In answer to your 1st question, §489.03(2), F. S., provides among other things: "Each member of the commission shall be paid \$10 per day, or any part of a day, during the time that the commission shall be in session, and they shall also be paid a mileage allowance at the rate of seven cents a mile to and from their respective homes and the place of meeting of the commission."

The per diem and mileage allowance provided by §112.061(1), referred to in your question, relates generally to state officers and employees and is controlling unless a different amount is specifically prescribed for particular officers or employees by the legislature. It is, therefore, my opinion that the specific amount provided in the applicable section of the watchmakers law is controlling as to the amount allowable members of the commission. Employees of the commission would, however, be paid per diem and mileage at the rate prescribed in §112.061(1), *supra*, inasmuch as the watchmakers law is silent in such regard.

As to your 2nd question, §489.03(2), F. S., provides among other things that the commission shall be authorized to "retain such horological experts and administrative employees as may be necessary. . . ." There is no inhibition relating to the employment of commission members for such purposes in Ch. 489, nor is there any specific legal objection elsewhere in state law. If there is an objection, it would be policy-wise in that a measure of control is lost when the employer becomes his own employee. In a sense,

a similar situation existed as to the barber board, but was subsequently clarified when the legislature provided, in the 1957 appropriations act, that members of the barber board shall not act in the dual capacity as inspectors.

Your questions are answered accordingly.

058-3—January 3, 1958

PUBLIC LANDS AND PROPERTY

APPLICATION OF §253.122, F. S., RELATING TO THE ESTABLISHMENT OF BULKHEADS TO SUBMERGED LANDS PURCHASED FROM THE STATE AND ITS AGENCIES—

§§253.12(1), 253.122, 253.123 AND 253.0013(2), F. S.

To: *Trustees Internal Improvement Fund, Tallahassee*

QUESTION:

May a board of county commissioners, under and pursuant to §253.122, F. S., establish bulkhead lines over lands in private ownership which were acquired prior to the effective date of Ch. 57-362, under §253.12, F. S., or prior statutes or laws, so as to prevent the filling of a part of such lands?

Section 253.123, F. S., provides that no person, firm, or corporation shall add to or extend lands or islands bordering on navigable waters, as defined in §253.12(1), without first complying with §253.122, which requires the establishment of a bulkhead line. The section exempts from its operation only those persons who have purchased from the trustees of the internal improvement fund and who, at the effective date of the act, have permits from the U. S. corps of engineers, and approved by the trustees of the internal improvement fund. Section 11 of the act provides that the act shall not apply to the construction or extension of lands and islands between the ordinary high water mark and a bulkhead line previously established, where the construction or extension commenced, or application for permit was filed with the corps of engineers prior to the effective date of the act. The last paragraph of §253.12 provides that when lands bordering on navigable waters have heretofore been filled by any person, state agency, county, city or other political subdivision, the trustees of the internal improvement fund shall upon application convey to the upland riparian owner or owners.

The language of §253.12, when read in context with the rest of the act clearly indicates that the definition of navigable waters was intended to embrace "*all coastal and intracoastal waters of the state*" (emphasis added), which do not include fresh water lakes, rivers and streams.

It therefore seems, with the exception of said situations described in §§253.123 and 253.0013 (2), and the last paragraph of §253.12, F. S., which are outlined above, bulkhead lines can be established across any lands in said navigable waters of the state, including those conveyed prior to the effective date of the act. The fixing of a bulkhead across private property, although it may limit the use of the property, does not divest the owner of his title absolutely. However, it does restrict its private use for the benefit of the general public. We do not construe the act to mean that only lands, title to which was vested in the trustees pursuant to

law (that is either by the 1951 act or earlier acts or the bulkhead act itself), are subject to having bulkhead lines thereon. The intent of the act is to provide bulkhead lines or recognize bulkhead lines previously established to accomplish a public purpose under the police power. Title may have been vested in private persons prior to the act, but this does not take away the power of the legislature to regulate in the manner provided by the bulkhead act unless it can be shown that a constitutional right is violated in a particular case. No rights, however, are absolute.

The government through the exercise of its police power may impose restrictions upon the use of property in the interest of public health, morals, safety and public welfare (*City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364). This police power is inherent in every sovereignty, (16 C. J. S. Const. Law, §174, p. 889), and the possession and enjoyment of rights and property are subject to the valid exercise of this power (*Sharrow v. City of Dania*, 83 So. 2d 274). The protection afforded property rights by a constitutional guarantee cannot be construed to mean that the use thereof cannot be regulated under the police power for the general welfare (*Knowles v. Central Allapattae Properties*, 145 Fla. 123, 198 So. 819).

Under the above authority, your question is answered generally in the affirmative; however, when administering §253.122, F. S., the governing body must use care in establishing bulkhead lines across private property, and such lines should only be so fixed when necessary to protect the rights and interest of the public in their use of the waters, and the rights of other riparian owners in the vicinity. Boards of county commissioners and municipalities, when establishing bulkhead lines under said §253.122, should keep full and complete records of such proceedings so that in case of an application for review by the circuit court a complete transcript will be available for the use of the court.

058-4—January 3, 1958

COURTS

JUSTICE OF THE PEACE, POLK COUNTY—JURISDICTION
AND AUTHORITY—§§22, AND 25, ART. V, STATE
CONST.; §§37.01(3), 37.24(1), §823.01, 823.05 AND
64.11, F. S.

To: *Clifton Kelly, County Solicitor, Lakeland*

QUESTIONS:

1. What is the jurisdiction of a justice of the peace in Polk county?
2. What jurisdiction authorizes a justice of the peace in Polk county to abate a public nuisance?
3. What authority does the justice of the peace possess to enforce his jurisdiction exercised under "2" above?

A proper answer to "1" above has been the object of much legal controversy throughout Florida since the enactment of §22, Art. V of the Florida constitution of 1885, as compared with the enactment of §25, Art. V of the Florida constitution of 1885. Section 22, Art. V provides in pertinent part that the "Justices of the Peace shall have jurisdiction . . . in such criminal cases,

except felonies, as may be prescribed by law . . .". Section 25, Art. V provides that the criminal court of record ". . . shall have jurisdiction of *all* criminal cases, not capital, which shall arise in said counties respectively." (Emphasis supplied.)

In *Jackson v. State*, 33 Fla. 620, 15 So. 250, it was held that §25, Art. V of the 1885 Florida constitution took precedence over §22, Art. V, and that justices of the peace had *no* trial jurisdiction in *any* county of the state wherein there was established a criminal court of record. Therein, the supreme court of Florida interpreted §25 Art. V, to mean in pertinent part as follows:

. . . The Constitution clearly means that, wherever there is a county criminal court, no offense, not capital, committed in the county, shall be tried in any other manner. Its purpose in providing the court, and making this declaration, was that wherever the legislature acting, as it is their duty to do, upon an application by a majority of the voters of a county, should establish a criminal court of record, such court should have the exclusive jurisdiction to try all offenses not capital, committed in the county. Wherever there is such a court the organic law gives to any person charged with such an offense the right to be tried in it under the forms and safeguards indicated . . .

This interpretation remained the guidepost despite the amendment to §22, Art. V, in 1896, until 1928, when it was modified to the extent of practical reversal by the supreme court of Florida in *State v. Sullivan*, 95 Fla. 191, 116 So. 255. The pertinent part of the dictum contained in the *Sullivan* case as related to the question at hand, is as follows:

In the terminology of the law the word "jurisdiction," as applied to courts, has a well-defined meaning and there is nothing in its inherent nature which renders it exclusive. That there are classifications in jurisdiction is as well known and understood as are the classifications of nouns, verbs, and adverbs, or the classifications of trusts and corporations. Jurisdiction may be exclusive or concurrent, original, appellate, or final. These classifications are frequently recognized in the Constitution and statutes of our states. An inspection of sections 5, 11, 17, 18 and 22 of article 5, dealing with the jurisdiction of various courts comprising our judicial system, discloses that circuit courts and the Supreme Court have original and concurrent jurisdiction in certain matters. In other matters a like rule applies to circuit and certain inferior courts, while the circuit courts have "exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts, and in all cases involving the legality of any tax assessment, or toll; of the action of ejectment and of all actions involving the titles or boundaries of real estate, and all criminal cases not cognizable by inferior courts; and original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matter as the legislature may provide." (§11, Art. V, State Const.)

Jurisdiction then "is not like a grant of property which cannot have several owners at the same time." Two or more courts may have concurrent jurisdiction of the

same subject-matter, and the rule is well settled that when the constitution or the statute in specific terms vests jurisdiction in any tribunal without the qualifying term "exclusive," or words of equivalent import, the legislature may in its discretion vest the like jurisdiction in another court or tribunal. . . .

It therefore appears that the supreme court now recognizes the fact that the two conflicting constitutional sections of Art. V can operate together in workable co-existence.

Referring now to that part of §22 Art. V, which vests a justice of the peace with "jurisdiction in such criminal cases, except felonies, as may be prescribed by law," we must necessarily refer to the present day statutes in force which have been enacted by authority of said amendment. We refer you first to §37.01, F. S. which became effective June 15, 1953. In subsection (3) of this section of the statutes we find the following language:

Jurisdiction, in counties having a population of over fifty thousand according to the last preceding state census and a county court, to try and determine all misdemeanors committed in their respective districts punishable by fine not exceeding one hundred dollars or by imprisonment not exceeding three months.

Thus, in the light of the Sullivan case, *supra*, it would appear that the above statutory authority is controlling, as Polk county established a county court in 1893.

Additional jurisdiction is conferred upon certain justices of the peace by virtue of §37.24(1), F. S., which provides in pertinent part:

After the passage of this section, justice of the peace courts located a distance of forty or more miles from the county seat in counties having a criminal court of record shall have power to hold a court to try and determine misdemeanor cases in which the penalty is not more than one hundred dollars fine or ninety days in jail, or both such fine and imprisonment; . . .

This provision may or may not apply to Polk county, but is called to your attention in the event it does apply.

The answer to question "2" above is found in §823.01, F. S., and reads as follows:

All nuisances which tend to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, shall be indictable and punishable by a fine not exceeding two hundred dollars, at the discretion of the court.

Any nuisance which tends to the immediate annoyance of the citizens in general, or is manifestly injurious to the public health and safety, or tends greatly to corrupt the manners and morals of the people, may be removed and suppressed by the order of the justice of the peace of the district, founded upon the verdict of twelve householders of the same, who shall be summoned, sworn and impaneled for that purpose, which order shall be directed to and executed by any sheriff or constable of the county; and an indictment or information shall lie for the same.

From the reading of the 2nd paragraph thereof, we conclude

that a justice of the peace in Polk county, after having followed the directions of the statute, would have the power under proper and sufficient showing by the 12 householders, to order the nuisance removed and suppressed, but, since the penal provision of the statute, set forth in the 1st paragraph thereof, is in excess of the jurisdictional limitation contained in §37.01(3), F. S., supra, the justice of the peace would be powerless to levy same upon the person responsible for the nuisance. In this connection see opinion 056-296, a copy of which is attached.

Answering question "3" above, should the order of the justice of the peace with reference to the suppression of the nuisance be ignored, then the justice of the peace in his discretion, would be authorized to entertain contempt proceedings against the person or persons maintaining said nuisances in defiance of the order of suppression.

It should be noted that §64.11, F. S., provides an additional remedy in chancery for the abatement of any nuisance as defined in §823.05, F. S. In F.S.A. 5, §64.11, we find the following:

In *National Container Corporation v. State*, 138 Fla. 32, 189 So. 4, 122 A.L.R. 1000, the court said: "The statute [this section] merely extends to the citizen the right to act in the name of the State in that class of cases where under the statute without such provision the citizen could not act affirmatively but would have to depend entirely upon the willingness of the Attorney General to sue in the name of the State."

It therefore appears that the above civil statute is not in conflict with the provisions of Ch. 823, F. S.

058-5—January 3, 1958

CRIMINAL PROCEDURE

APPEAL OF DEFENDANT—COST OF PREMIUM FOR BOND UPON REVERSAL—§§939.06, 648.05, F. S.; §9, ART. 16, STATE CONST.

To: Vivion B. Rutherford, Special Counsel, Miami

QUESTION:

Where a defendant appeals his conviction from the municipal court of the city of Miami to the circuit court 11th judicial circuit, and upon such appeal his conviction is reversed, is the cost of his bond premium for securing supersedeas upon appeal a proper element of cost to be borne by the original prosecuting authority?

Section 939.06, F. S., provides in pertinent part:

No defendant in a criminal prosecution who is acquitted or discharged shall be liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody. . . ." (Emphasis supplied.)

It will therefore be noted that the statute relieving an acquitted defendant of costs pertains only to the primary judicial costs involved, together with the actual costs of his incarceration. Judicial costs are normally construed to include the costs of issuing the warrant, serving and making return upon same, witness fees and jurors fees. The sheriff usually has an additional charge for impounding the prisoner, taking him to and from the jail during

court proceedings and feeding him. We fail to find any authority in the law which would designate the costs of a bond premium for appeal purposes as a proper expense to be assumed by the original prosecuting authority in criminal cases where the defendant prevails upon appeal.

This office rendered a similar opinion on Aug. 4, 1948, in A. G. O. 048-259, B. R., 1947-48, p. 562-3.

We are not unmindful of §648.05, F. S., which provides that any fiduciary required by law to give bond as such may include as part of his lawful expense such reasonable sum paid a surety company for such suretyship. We cannot, however, take the position that one who is convicted in any court for a criminal offense is required by law to take an appeal from such a conviction, and all such criminal appeals are presumed to be the voluntary act of the appellant.

I am further not unmindful of the provisions of §939.06, F. S., 1941, and §9, Art. XVI of the Florida constitution which requires the county to pay all legal costs, fees and expenses of a defendant who has been discharged or acquitted. However, I do not consider the premium for supersedeas bond for one convicted of a crime to be such legal costs, fees and expenses as are contemplated by said statute and constitution.

I, therefore, answer the question in the negative.

058-8—January 10, 1958

STATE OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—RETIREMENT SOCIAL SECURITY FUND, CONTRIBUTIONS—REFUNDS—§§123.30(3), (6), 650.06(2), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a state employee who contributes to the retirement social security fund entitled to a refund of the amount withheld from his salary and deposited with the retirement social security fund in his behalf when said employee resigns or is otherwise separated from state employment?

Section 122.30 (3), F. S., provides in part as follows:

... there is appropriated out of the state and county officers and employees retirement fund and into the retirement social security fund the amount required by applicable set laws and regulations. . . .

The above quoted section clearly provides for a transfer of funds "out of state and county officers and employees retirement fund and into the retirement social security fund."

Section 122.30 (6) further provides for the transfer of funds in accordance with §650.06, F. S. Chapter 650, F. S., is entitled Social Security for Public Employees, and §650.06 (2), F. S., provides:

(2) The contribution fund shall be established and held separate and apart from any other funds or monies of the state and shall be used and administered exclusively for the purpose of this chapter. Withdrawals from such fund shall be made for, and solely for

(a) payments of amounts required to be paid to the secretary of the treasury pursuant to an agreement entered into under §650.03;

(b) payments of refunds provided for in §650.04(3); and

(c) refunds of overpayments, not otherwise adjustable, made by a political subdivision or instrumentality. (Emphasis supplied.)

Section 650.06(2), F. S., apparently contains the only provision for withdrawals from the contribution fund and I find no authority set out therein for reimbursing a state employee who has previously contributed to said fund and then elects to resign or is otherwise separated from state employment.

Based on the above discussion, the question as set out above is answered in the negative.

058-9—January 10, 1958

STATE FINANCE

SURPLUS PROPERTY—COST AND EXPENSES, ADVANCING, ETC. §215.421, F. S.—§§7 AND 10, ART. IX, §16, ART.

XVI, STATE CONST.

To: State Auditing Department, Tallahassee

QUESTION:

May the Florida development commission, in connection with its procurement of surplus properties for charitable and non-profit hospitals and schools, and for the state and its agencies, subdivisions and municipalities, advance the costs and expenses incurred in such procurement from its revolving fund, and subsequently bill such hospitals and schools, etc. for same?

There was set up in the appropriations act of 1953 (Item 27, §1, Ch. 28115, 1953,) the sum of \$50,000 as a revolving fund for the Florida state improvement commission, now the Florida development commission "to be used when handling surplus property and to revert to the general revenue fund *when program is completed*. Necessary salaries and expenses incident to the acquisition of the surplus property will be paid from the revolving fund, and the costs will be *reimbursed to the revolving fund* by the agencies receiving the property as cost of the acquisition." (Emphasis supplied.)

The above revolving fund was recognized and approved as a continuing fund by Ch. 57-134, which now appears as §215.421, F. S. This statute provides that "this revolving fund, however, is to remain in existence as a separate fund until the surplus property program under the development commission is terminated."

It is necessary that we consider in this connection §7, Art. IX, State Const., which provides that "no tax shall be levied for the benefit of any chartered company of the State." And §10, of said Art. IX, provides in part that "the credit of the State shall not be pledged or loaned to any individual, company, corporation or association . . ." The court, in *Overman v. State Board of Control*, Fla., 62 So. 2d 696, text 701, remarked that ". . . neither do we think a nonprofit Educational Institution, such as the University of Miami, is any such 'chartered company,' 'individual company,' 'corporation or association' as is contemplated by Sections 7 and 10,

Art. IX, of the State Constitution." In *State v. Town of North Miami, Fla.*, 59 So. 2d 779, text 783, the court remarked that "the State is not a corporation within the meaning of Section 10, Article IX, of the Constitution." The fact that a facility, such as a dormitory at a public university or school, may be used by individuals who receive benefit therefrom does not of itself constitute a violation of §§7 and 10, Art. IX, State Const. (*State v. Board of Control, Fla.*, 66 So. 2d 209, text 212). The purpose of said §10, Art. IX, State Const., appears to have been to prevent "counties, cities, townships or other incorporated districts of the State from becoming stockholders in or loaning their credit to any corporation, association, institution or individual" (*Brautigam v. White, Fla.*, 64 So. 2d 781, text 784). See also *Bailey v. City of Tampa*, 92 Fla. 1030, 111 So. 119, text 120, *Raney v. Lakeland, Fla.*, 88 So. 2d 148, text 150, and *State v. Daytona Beach Racing and Recreational Facilities District, Fla.*, 89 So. 2d 34, text 37 and 38).

Tax exemption for charitable, benevolent, educational and religious institutions, and especially charitable hospitals and private schools, often are based upon, or partly upon, the theory that they render public services that would otherwise have to be rendered at public expense (51 Am. Jur. 549, §554 and annotations cited in note two thereof). These institutions differ from those intended by §10, Art. IX, and §16, Art. XVI, State Const., as interpreted in *Brautigam v. White*, supra, *Bailey v. City of Tampa*, supra, *Raney v. Lakeland*, supra, *State v. Daytona Beach Racing and Recreational Facilities District*, supra, *Cragor Co. v. Doss*, 150 Fla. 491, 8 So. 2d 17, *State v. Doss, Fla.*, 8 So. 2d 17, text 18, and *Rogers v. Leesburg*, 157 Fla. 784, 27 So. 2d 70, text 70 and 71.

In the light of the above and foregoing authorities we conclude that charitable and nonprofit hospitals and schools, as well as the state and its agencies, subdivisions and municipalities are not individuals, companies, corporations or associations, within the contemplation of §§7 and 10, Art. IX, State Const., and are, therefore, within the purview of the revolving fund set up by item 27, §1, Ch. 28115, 1953, and §215.421, F. S. This being true, the above stated question is answered in the affirmative.

058-11—January 10, 1958

EDUCATION

INSTITUTIONS OF HIGHER LEARNING—TEACHERS SCHOLARSHIP LAW, CONSTRUCTION—§239.41, F. S.

To: *J. B. Culpepper, Director, Board of Control, Tallahassee*
QUESTIONS:

1. Is it mandatory that the holder of a state teachers scholarship be registered in the college, school, department or division of education of the institution which he is attending?

2. May a student be registered in more than one school or department of the institution at the same time?

3. May a student who is registered in the school of education graduate with a degree in agriculture or some field other than education?

The pertinent portions of §239.41, F. S. provide:

Each such person awarded a general scholarship loan

shall attend (1) an institution of higher learning in Florida approved for teacher education, or (2) a junior college in Florida (for a period not to exceed two years), approved by the state board under regulations of that board.

Each person who becomes a scholarship holder *shall enroll in a college or university in Florida approved for teacher education or in an approved junior college in Florida not later than the beginning of the first semester or quarter subsequent to the notification of the scholarship loan. The scholarship holder shall be registered in the college, school, department, or division of education of an institution approved for teacher education in Florida, shall have his program approved by the dean of the college, school, department, or division of education in accordance with the requirements for the graduate certificate as contained in Florida state board regulations relative to teacher education and certification; and must complete to the satisfaction of the institution the work he is undertaking each year.* (Emphasis supplied.)

AS TO QUESTION 1:

It is my opinion that the intent of the legislature as disclosed by the above quoted language is crystal clear and requires no interpretation. The scholarship holder, according to the statute, must register ". . . in the college, school, department or division of education of an institution approved for teacher education in Florida, shall have his program approved by the dean of the college, school, department or division of education. . . .

This language can have only one meaning, and that is that the scholarship holder must register in the college, school, department or division of education and his program must be approved by the dean thereof.

AS TO QUESTION 2:

Section 239.41 does not prohibit the registration of students in more than one school or division. This question would necessarily have to be answered in accord with the rules and regulations applicable to each individual institution involved in teacher training. In the case of state institutions of higher learning, the responsibility for formulating policies governing matters such as this is in the board of control. Your specific question is therefore answered as follows:

Section 239.41, the teacher scholarship act, does require that the scholarship holder must be registered in the school or division of education. It would not, however, prohibit him from also being registered in another school or division of the institution if the laws, policies, rules and regulations governing said institution permit a dual registration.

AS TO QUESTION 3:

Section 239.41 does not require a scholarship holder to receive a degree in education. It does require him to be registered in the school or department of education and to have his courses approved by the head of said department and it is the legal duty of the approving officer to see to it that the scholarship holder takes all necessary courses which the law and state board regulations required for teacher certification. Your specific question is therefore answered in the affirmative in so far as the provisions of

§239.41 are concerned. It may be, however, that the laws, rules and regulations of a specific institution of higher learning would not permit students registered in one school or college to receive a degree in some other school or college in the same institution. This question would therefore have to be answered in accordance with the governing laws, rules and regulations of each institution which is qualified to give teacher training in Florida. However, in so far as state institutions under the board of control are concerned, said board should formulate such regulations as will require compliance by such institutions with §239.41 and state board of education regulations thereunder.

It is also pointed out that §239.41 places the duty on the state board of education to adopt an appropriate regulation or regulations setting out the required courses of study for certification to teach in Florida. These regulations will be the guide for the dean in approving the courses of study for each scholarship holder.

Summarizing the above observations, it is my opinion that the clear intent of §239.41, F. S., is to make certain that a person receiving a state teacher scholarship will carry out the purpose for which the scholarships were created and will take the required courses necessary under Florida law and state school board regulations for him to be certified to teach in the public schools of Florida when he graduates.

To this end, the legislature has required teaching scholarship holders to register in that part of the institution which deals with education, whether it be called a college, school, department or division and to have his courses approved by the dean or head of said department so that the courses he takes will include those which are required by law and state board regulations for teacher certification. Otherwise, the purpose of a teacher scholarship act would in some cases be nullified.

058-12—January 14, 1958

INSURANCE

RETALIATORY LAW, §626.061, F. S.—SURETY BONDS ON "PRINCIPAL OFFICERS," STATE OF MASSACHUSETTS

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

In view of the fact that Massachusetts requires a surety bond to be filed on the "principal officers" of all insurance companies doing business in that state, is it mandatory under the provisions of §626.061, F. S., for the insurance commissioner of Florida to require a similar bond on the principal officers of Massachusetts insurance companies doing business in this state?

Section 626.061, F. S., provides:

Retaliation.—(1) Whenever the existing or future laws of any other state or country shall require of companies incorporated or organized under the laws of this state actually applying to do business in another state as a condition precedent to their doing business in such other state or country, compliance with laws, rules, regulations and prohibitions more onerous or burdensome than the rules and regulations imposed by this state on

foreign or alien companies, or shall require any deposit of securities or other obligations in such state or country for the protection of policyholders or otherwise or require of such companies actually licensed and doing business in such other state, fees, penalties, charges or taxes required in the aggregate for like purposes by the laws of this state, of foreign or alien companies, then such laws, rules, regulations and prohibitions of said other state or country *shall* apply to companies incorporated or organized under the laws of such state or country doing business in this state, and all such companies doing business in this state *shall*, in the same manner and for the same purpose be required to make deposits, pay penalties, fees, charges and taxes, in amounts equal to those required in the aggregate for like purposes of Florida companies doing business in such state or country; . . ." (Emphasis supplied.)

We assume for the purposes of this opinion that an insurance company organized under the laws of Florida has applied to do business in Massachusetts or is actually doing business there. The retaliatory law, §626.061, F. S., by its express terms may not be invoked until such time as a Florida insurance company has been required to conform to substantially more onerous or more burdensome regulations than Florida imposes on foreign insurance companies doing business in Florida.

Retaliatory legislation is designed to prevent unfavorable discrimination against domestic companies by other states. In construing such statutes the legislative intent must be ascertained but a strict construction must be given and the statutes must not be applied to cases which do not plainly fall within the letter of the law. However, under such statutes the state administrative agency has no discretion to fail to apply the law (see Appleman, *Insurance Law and Practice*, Vol. 19, §10352).

Section 626.061, F. S., requires retaliation in the most broad language. It requires retaliation where "rules, regulations and prohibitions (are) more onerous or more burdensome." It also makes retaliation mandatory whenever the foreign state requires "any deposit of securities or other obligations in such state for the protection of policyholders or otherwise."

It is my opinion that the Massachusetts requirement that a surety bond be filed on the principal officers of Florida insurance companies doing business in Massachusetts is within the contemplation of §626.061, F. S. and that retaliation is mandatory by requiring a similar surety bond to be filed on the principal officers of Massachusetts insurance companies doing business in Florida.

Your question is answered in the affirmative.

058-13—January 14, 1958

STATE FINANCE

STATE BOARD OF CONTROL, ALTERATION, ADDITION,
ETC. WITHOUT LEGISLATIVE AUTHORIZATION,
BUDGET COMMISSION—§§240.102 AND 216.28, F. S.

To: J. B. Culpepper, Director, Board of Control, Tallahassee

QUESTION:

May the state university system erect a building, or add to, remodel or alter any building in an amount ex-

ceeding \$15,000; provided, that the contributions of state funds do not exceed \$15,000—even though the project has not received specific authorization by the legislature?

Section 240.102, F. S., provides:

(1) No buildings except as hereinafter provided shall be constructed, altered, remodeled or added to by the state university system without express approval of each such project having first been granted by the legislature.

(2) This section shall not be construed to prohibit construction of any new buildings *solely* from non-state sources such as federal grant funds, private gifts or grants for the specific building to be constructed, nor to prohibit the replacement of any building destroyed by fire or other calamity; *provided such replacement is limited to proceeds of insurance or other indemnities and no further state moneys or obligations of the board of control are used in such replacement*; nor to prohibit construction of dormitories or other auxiliary accommodations financed as provided in §243.131. This section shall not apply to construction of new buildings or alterations or remodeling to meet needs as determined by the board of control, provided that the total cost of the *completed building or completed alterations or completed remodeling* shall not exceed fifteen thousand dollars. (Emphasis supplied.)

Section 216.28, F. S., provides:

All moneys received by the institution under the management of the state board of control, other than from state and federal sources, are hereby appropriated to the use of the state board of control, for the respective institutions collecting same, to be expended as the state board of control may direct; provided however, that said funds shall not be expended except in pursuance of detailed budgets filed with and approved by the state budget commission, and *shall not be expended for the construction or reconstruction of buildings costing in excess of fifteen thousand dollars, except upon specific authorization by the legislature except sums received from non-state sources for construction.* (Emphasis supplied.)

Although it was my first impression upon review of this question that the legislature did not intend to so restrict the state universities in their building program that state appropriated funds in relatively small amounts could not be used to supplement gifts or other non-state funds in the construction of buildings, I have been forced to the conclusion upon a careful reading of the above quoted statutes that such is the inescapable effect of the language of the statutes, if not the actual intent of the legislature.

You will note that the above quoted provisions of §240.102, F. S., make certain exceptions to the prohibitions against construction or alteration of buildings without legislative approval of the project. One exception relates to construction of buildings from funds *solely* from non-state sources. It would appear that this language would be applicable to the situation contemplated in your question where non-state funds are to be commingled with state funds in an amount less than the \$15,000 and that such commingling of state

and non-state funds would not come within the exception provided in §240.102.

Use of the word "solely" from non-state sources does not permit, in my opinion, an interpretation of this section which would authorize the construction of a building without legislative approval to cost more than \$15,000, even though a part of the bill is to be paid from non-state funds and less than \$15,000 of state funds would be used.

Emphasis is also added to the apparent fact that the legislature intended to prohibit a commingling of state and non-state funds on projects costing more than \$15,000 unless specifically authorized by the legislature by the use of language quoted above from §240.102 (2), F. S., "... provided that the total cost of *completed* buildings or *completed* alterations or *completed* remodeling shall not exceed \$15,000." (Emphasis supplied.)

Additional evidence of the purpose or intent of the legislature is provided in the italicized language in the same section of the law which specifically prohibits the board of control from using other state funds to supplement insurance proceeds in replacing a building destroyed by fire or other calamity.

In view of the clear, specific and reiterated prohibitions set forth by the legislature and noted above, I must reluctantly reach the conclusion that your question can only be answered in the negative under existing Florida law.

058-14—January 14, 1958

TAXATION

OCCUPATIONAL LICENSES, ACCOUNTANTS—CH. 205,
§§473.27, 473.12, 473.19, 473.21, 473.26 AND 473.28, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should §473.27, F. S. be construed as prohibiting the issuance of occupational licenses and the collection of license taxes, under Ch. 205, F. S., to and from persons practicing accountancy but who do not hold themselves out as "public accountants" or as "certified public accountants"?

This question grew out of the holding by the supreme court of this state, in *Florida Accountants Ass'n v. Dandelake*, Fla., 98 So. 2d Adv. 323, that accountants, who are not public accountants or certified public accountants holding certificates of authority from the state board of accountancy, may do ordinary accounting work and call themselves "accountants" rather than "bookkeepers," and that the prohibition in Ch. 473, F. S., was in effect one against holding one's self out as a certified accountant or certified public accountant without being duly registered, and not a prohibition against practicing accountancy without registration with the said state board.

Although §473.27, F. S., prohibits the issuance of occupational licenses "to practice accountancy unless said person so applying for an occupational license shall produce to said official a registration card for the year in which application is made issued by the board of accountancy showing that said applicant is the holder of a license to practice as a public accountant or as a certified public

accountant under the provisions of the laws of this state." Section 473.27, F. S., was added to Ch. 473, F. S., by §5, Ch. 24164, 1947. This same act, by §§1, 2, 3 and 4 thereof, amended existing §§473.12, 473.19, 473.21 and 473.26, F. S., and, by §6 thereof, added additional §473.28, F. S., since repealed.

It seems evident from said §§473.12, 473.19, 473.21, 473.26 and 473.28, F. S., and the fact that the legislature added §473.27 to Ch. 473, instead of making it a part of Ch. 205, F. S., that said §473.27 was designed and intended as a regulation under said Ch. 473, which relates to the registration of "public accountants" and "certified public accountants," as defined and regulated by said Ch. 473, and not to "accountants" as such.

We, therefore, hold that said §473.27, F. S., relates to the issuance of occupational licenses to "public accountants" and "certified public accountants" and that it has no relation to "accountants" as such and who are not subject to registration under said Ch. 473, F. S. We find nothing in Ch. 473, including the amendment made by Ch. 57-273, indicating any intention on the part of the Florida legislature to regulate the business of "accountancy" as such. The regulation is that of persons holding themselves out as "public accountants" or "certified public accountants."

The above question is answered in the negative.

058-15—January 14, 1958

PUBLIC FUNDS

USE, PUBLIC PURPOSE—BAR ASSOCIATION DUES OF COUNTY OFFICIALS, PRIVATE EXPENSE

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. May a county judge or justice of the peace charge bar association dues and Florida bar dues to the expense of his office?

2. If the answer to the 1st question is in the negative, may such dues be charged by a county judge who, by local or special law, is required to be a member of the Florida bar?

AS TO QUESTION 1:

It is so well settled in this state that no authority need be cited for the proposition that public funds may be expended only for public purposes.

It is equally well settled that the privilege of engaging in the practice of law is a private personal privilege.

It is my opinion that local bar associations and the Florida bar dues are private expenses, personal to the individual belonging to these organizations, and may not be considered an expense of a county judge or the justice of the peace.

Question 1 is answered in the negative.

AS TO QUESTION 2:

The legislature may validly set up certain standards as to the qualifications of individuals performing governmental acts.

Where a special or local law requires a county judge or a justice of the peace to be a member of the Florida bar, it is my opinion that the legislature is requiring a legal background as a qualification of the individual performing the activities of county

judge or justice of the peace. This I believe to be a proper exercise of the legislative function.

In these cases, I am of the opinion that dues of the Florida bar may not be charged as an expense of the county judge or the justice of the peace.

Question 2 is answered in the negative.

058-16—January 15, 1958

LIQUORS AND BEVERAGES

BEVERAGE LAW ADMINISTRATION—EMPLOYMENT OF POLICE OFFICERS WHILE OFF DUTY AS SECURITY OFFICERS AT DOG RACING PLANTS—§561.25, F. S.

To: *Thomas H. Anderson, Village Attorney, Miami*

QUESTION:

May police officers of Miami Shores Village work at the Biscayne kennel club during off-duty hours when the function that these officers will perform will be security police and to detect any violations of law that might happen on the premises of the licensee, Biscayne kennel club?

You stated in your letter that some question had arisen as to whether or not these police officers might be barred from such employment by reason of Ch. 57-420, as it amended §561.25, F. S. Section 561.25, F. S., provides as follows:

561.25. Officers and employees prohibited from being employed by or engaging in beverage business; penalties.—No officer or employee of the state beverage department, and no sheriff or other state, county or municipal officer with state police power granted by the legislature, shall be permitted to engage in the sale of alcoholic beverages under the beverage law; or be employed, directly or indirectly in connection with the operation of any business licensed under the beverage law; or be permitted to own stock or interest in any firm, partnership or corporation dealing wholly or partly in the sale or distribution of alcoholic beverages. Any person violating this provision of the beverage law shall be guilty of a misdemeanor and shall, upon conviction, be automatically removed or suspended from office and punished by a fine of not more than \$500 or by imprisonment in the county jail for not more than 6 months, or both.

In a 1953 opinion 053-311, we held that the provisions of §561.25, F. S., as it existed at that time, although it did not specifically name deputy sheriffs, nevertheless it included a deputy sheriff and prohibited him from engaging in or being in anywise connected with or interested in the sale or distribution of alcoholic beverages or intoxicating liquors.

The intent and purpose of §561.25, F. S., is to prohibit law enforcement officers from being licensed as dispensers of alcoholic and intoxicating liquors or from being connected with licensed premises in such a way as to interfere with or prevent the officer involved from enforcing the beverage law in an unbiased and unprejudiced manner.

Liquor dispensing licenses issued to caterers at horse and

dog racing plants are issued under the provisions of §561.34(12), F. S., and are a special type license in that the caterer can dispense and sell alcoholic beverages only within the enclosure where such racing is conducted and only during the period 10 days before the race meet opens, during the specific meet and ending 10 days after the race meet closes at a particular racing plant.

In so far as the dispensing of alcoholic beverages is concerned, a racing permit holder dispenses such alcoholic beverages as a mere incident to its main business, that is, racing. Therefore, it is my opinion that a municipal police officer who might be employed by a racing permit holder and licensee in a capacity as security officer or law enforcement officer would not be prohibited by §561.25, F. S., from accepting said employment.

Prior to the enactment of Ch. 57-420, which specifically names municipal officers, this office and the state beverage department, the agency required to enforce the beverage laws, have construed §561.25, F. S., as prohibiting municipal police officers from engaging in the sale of alcoholic beverages or from becoming a licensee or from being employed directly or indirectly with the operation of a licensed beverage business. This would prohibit officers from acting as guards or bouncers at bars, taverns, night clubs, etc.; however, it would not prohibit an officer from being employed by a hotel or racing plant as a security officer because in such cases dispensing alcoholic beverages is merely an incident to the principal business (*State ex rel Floyd v. Noel*, 124 Fla. 852, 169 So. 549), and the officers' duties are not connected directly or indirectly with the operation of the liquor business.

Your question, with the foregoing limitations, is answered in the affirmative.

058-17—January 16, 1958

PUBLIC OFFICERS, OFFICES AND RECORDS

INSTRUMENTS FILED FOR RECORD IN OFFICE OF DEPUTY
CLERK OF CIRCUIT COURT—NOTICE—§§28.06, 28.07,
695.11, F. S., §4, ART. XVI, STATE CONST.

To: *Edward H. Bergstrom, Jr., Deputy Clerk, Clearwater*

QUESTIONS:

1. When does an instrument entitled to be recorded become constructive notice if presented to a deputy clerk in a branch office maintained by the clerk of the circuit court?
2. Is it proper to place the electric time stamp which bears the words "Recorded Pinellas County, Florida, Avery W. Gilkerson, Clerk" on the instrument at time of its receipt in St. Petersburg?

The facts presented in your letter of inquiry indicate that the clerk of the circuit court for the 6th judicial circuit is presently maintaining a branch office in a county building in St. Petersburg, in addition to the official office of the clerk of the circuit court maintained in the courthouse of Pinellas county at Clearwater. The operation of this branch office apparently has led to considerable confusion as to the time when an instrument presented to the deputy clerk for recording becomes a matter of public record.

AS TO QUESTION 1:

Section 4, Article XVI, State Const., provides:

Location of county offices; residence of clerk and sheriff.—All county officers shall hold their respective offices, and keep their official books and records, at the county seats of their counties; and the Clerk and Sheriff shall either reside or have a sworn deputy within two miles of the county seat.

Section 28.06, F. S., provides that:

The clerk of the circuit court may appoint a deputy or deputies, for whose acts he shall be liable, and the said deputies shall have and exercise each and every power of whatsoever nature and kind as the clerk himself may exercise excepting the power to appoint a deputy or deputies.

Section 28.07, F. S., provides that:

The clerk of the circuit court shall keep his office at the county seat of the county; however, in those counties in which the clerk feels such offices to be necessary, he may establish branch offices in other places than the county seat and may provide such offices with a deputy clerk authorized to issue process; provided, that all permanent official books and records shall be kept at the county seat of the county.

Section 695.11, F. S., provides that:

All instruments relating to real and personal property which are authorized or required to be recorded shall be deemed to be recorded from time the same are filed with the officer whose duty it is to record the same and as so recorded and transcribed upon the record shall be notice to all persons.

The constitutional provision above quoted requires that the official books of the clerk of the circuit court be kept at the county seat. The next quoted sections of the Florida Statutes clearly authorize the clerk of the circuit court to maintain a branch office in places other than the county seat and to employ a deputy clerk who shall have each and every power of whatsoever nature and kind as the clerk may himself exercise. Section 695.11, F. S., herein quoted, provides that instruments relating to real and personal property authorized or required to be recorded are deemed to be recorded from the time of filing with the proper officer, and when recorded and transcribed upon the record shall be notice to all persons. As to the time when an instrument presented to the deputy clerk in a branch office of the clerk of the circuit court for recording becomes notice to all persons, it is my opinion that it is the spirit and the intention of the constitutional and statutory provisions hereinabove quoted that constructive notice of the recording of an instrument is effective as of the time the instrument is placed in the official office of the clerk of the circuit court at the county seat.

Careful consideration has been given to §3 of Ch. 24819, 1947, a special act relating to Pinellas county, and I do not believe that this section may be considered as altering the opinion hereinabove expressed in any way.

AS TO QUESTION 2:

From the facts presented for our consideration, apparently the distinction between instruments filed in the branch office of the

clerk of the circuit court of Pinellas county located in St. Petersburg and instruments filed for record in the office of the clerk of the circuit court in Clearwater is only discernible to those persons familiar with the differences in the printing on the two electric time stamp machines used in the respective offices.

In harmony with my answer to question 1, it is my opinion that the electric time stamp machine, used by the deputy clerk in the branch office of the clerk of the circuit court in St. Petersburg, should print as follows: Received at the branch office of the clerk of the circuit court in St. Petersburg, with date and time of receipt shown. The time stamp machine used in the official office of the clerk of the circuit court at the county seat should read: Filed for record in Pinellas county in the office of the clerk of the circuit court at Clearwater, with the date and time shown.

Instruments presented to the deputy clerk in St. Petersburg, when delivered to the official office of the clerk of the circuit court in Clearwater, must be stamped in the same manner as instruments presented for recordation at the official office of the clerk of the circuit court in Clearwater.

Since instruments presented to the deputy clerk are not deemed to be recorded until received in the office of the clerk of the circuit court in Clearwater, it is my opinion that it is the duty of the deputy clerk to deliver instruments deposited with him for recordation in the office of the clerk of the circuit court in Clearwater, to said office in Clearwater with promptness and dispatch. Any delay in transmittal of these instruments between offices might well bring about serious consequences in those situations where the time of filing is of extreme importance.

Question 2 is answered in the negative.

058-18—January 20, 1958

LEGISLATION

LOCAL, REGULATING OPERATION OF MOTORBOATS ON NAVIGABLE WATERS OF U. S.

To: *Julian Warren, County Commissioner, Jacksonville*

QUESTION:

May county commissioners prepare local legislation to control the operation of motorboats in adjacent waters and could the state legislature pass and enforce such legislation?

A study of the federal numbering act of 1918, and the motorboat act of 1940 covering registration and safety regulation on navigable waters of the U. S. as they affect local legislation indicates that such legislation as you suggest could be passed and enforced in Florida. A summary of the jurisdiction of the coast guard under existing law provides that primary functions and responsibilities are as set forth in a recent report of the marine and fisheries congressional committee of the house of representatives:

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on

the high seas and on waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war.

The phrase "high seas and water subject to the jurisdiction of the United States" includes "the navigable waters of the United States," the navigation of which the Supreme Court has repeatedly held to be subject to Federal control within the meaning of the commerce clause of the Constitution of the United States. The basic doctrine is well summed up in the following passage from the Supreme Court's opinion in *Gilman v. Philadelphia*, decided in 1866:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all of the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation, and subject to all requisite legislation by Congress. . . . For these purposes, Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England."

Through major decisions ranging as far back as 1825, the concept of "the navigable waters of the United States" has developed from the early case of *The Thomas Jefferson*. In that case Federal jurisdiction was confined to the high seas and upon rivers as far as the ebb and flow of the tide extended. Later cases extended the jurisdiction to the inland waterways, to canals, and to waters wholly within a given State, provided they form a connecting link in interstate commerce. By 1871 "navigable waters of the United States" were defined as those that are navigable in fact, and if navigable in fact when so used, were susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. By 1940, in the case of *United States v. Appalachian Electrical Power Company*, the concept was further expanded to include waterways which by reasonable improvement can be made navigable for use in interstate commerce. Nor is it necessary that the improvement shall have been undertaken or authorized.

Despite the overriding constitutional powers of the Federal Government to regulate commerce on the navigable waters of the United States, *the Court has repeatedly held that the power does not exclude all State power of regulation*. Ever since 1851, it has been recognized that there is a residuum of power in a State to make laws governing matters of local concern which, nevertheless, in some measure affect interstate commerce or even, to some extent,

regulate it. Thus, the States may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress.

When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, such regulation has been generally held to be within State authority. In this connection, Chief Justice Hughes, in *Kelly v. Washington* (1937), said:

"The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

Thus, it would appear that State or local regulation of the use of the navigable waters is a valid exercise of State police power, unless it is irreconcilably in conflict with Federal regulation of the same subject matter. (Emphasis supplied.)

The committee on merchant marine and fisheries of the house of representatives has a bill pending in committee for the purpose of redefining "motorboats" and providing more stringent safety regulations than were originally adopted in the numbering act of 1918, and the motorboat act of 1940. The new act if adopted by congress, would provide more uniformity in the control of reckless and negligent operation of motorboats and would provide concurrent jurisdiction over enforcement by the states and federal government. All indications, however, point to the fact that if this act should be adopted by the 85th congress, the general principles of law as above set forth by Chief Justice Hughes in *Kelly v. Washington* (1937), would still prevail with reference to regulation of matters of local concern in character and effect.

These observations seem to answer your question.

058-19—January 20, 1958

LABOR

WORKMEN'S COMPENSATION—MEDICAL EXPENSES— CONSTRUCTION OF §440.25 (3)(b), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the Florida industrial commission authorized to pay the costs of a medical examination pending final determination of a claim, when such examination was given by a physician designated by a deputy commissioner pursuant to the authority contained in §440.25(3)(b), F. S.?

Where applicable to the above question, §440.25(3)(b), F. S., provides:

... When there is a conflict in the medical evidence submitted at the hearing the deputy commissioner may designate a *disinterested* doctor to submit a report or to testify in the proceeding, after such doctor has reviewed the medical reports and evidence, examined the claimant, or

otherwise made such investigation as appropriate. The report or testimony of any doctor so designated by the deputy commissioner shall be made a part of the record of the proceeding and shall be given the same consideration by the deputy commissioner as is accorded other medical evidence submitted in the proceeding; and all costs incurred in connection with such examination and testimony *may be assessed as costs in the proceeding*, subject to the provisions of §440.13(3)(a). (Emphasis supplied.)

It appears to the writer that the use of the term "disinterested" in describing the doctor to be appointed by the commissioner requires that he shall be neither the plaintiff's nor the defendant's representative as to medical testimony. The supreme court of appeals of Virginia subscribed to a similar position when it held that a physician who is paid either by the plaintiff or defendant is not "disinterested" within the meaning of a workmen's compensation statute requiring the appointment of a disinterested physician to examine a compensation claimant (*Basham v. R. W. Lowe, Inc.*, 11 S. E. 2d 638; 131 A.L.R. 761).

Further support for the above conclusion is that the above quoted statute provides that such costs may be "assessed as costs in the proceedings." Impliedly, such language would permit the payment of such costs by the commission pending the final determination of the claim. Such costs would be a proper charge on the fund created by §440.50, F. S., "for the payment of all expenses in respect to the administration" of the workmen's compensation law.

Although the above quoted provision of §440.25(3)(b) was created for the purpose of furnishing the deputy commissioner with further assistance in the determination of a claim when conflicting medical evidence exists, the additional assistance in the form of a disinterested doctor does not make such doctor an agent of the commission in the sense that the doctrine of respondeat superior applies (see *Commercial Casualty Inc. Co. v. Hilton*, 87 S.W. 2d 1081).

In light of the foregoing, your question is answered in the affirmative.

058-20—January 21, 1958

PUBLIC LANDS AND PROPERTY

ESTABLISHMENT OF BULKHEAD LINE—NOTICE OF RIPARIAN OWNERS—§253.122, F. S.

To: *Donald C. McClelland, Jr., County Attorney, Sarasota*

QUESTION:

Is notice by registered or certified mail required under §253.122(1), F. S.?

Section 253.122(1), F. S., provides that the board of county commissioners of each county or the governing body of a municipality, after public hearing of which 30 days notice has been given by publication for three consecutive weeks in a newspaper of general circulation in the county, may of their own initiative locate and fix a bulkhead line. There is no provision in this section which requires notice by certified or registered mail to riparian owners within 1000 feet.

Section 253.122, F. S., contemplates the establishment of a

bulkhead line in two instances: (1) Upon the county's or municipality's own initiative (as outlined above), or (2) Upon the request of the upland riparian owner (subsection (2)). There seems to be a distinct difference between these two provisions, for by subsection (1) a comprehensive bulkhead line is contemplated, while subsection (2) pertains to a bulkhead line only "within the area and vicinity" of the applicant's upland.

I do not believe the legislature intended by subsection (1) to require a municipality to give notice by certified or registered mail to upland owners within 1000 feet when establishing a bulkhead line over such an extended area. Subsection (2) is an entirely different situation. Here the bulkhead line covers only a limited area and the burden of such notice would not be so great. This subsection is very similar to the provisions of subsection (4), which pertains to re-established bulkhead lines and does require notice by certified or registered mail. I held in opinion 057-269, dated Sept. 10, 1957, that even though subsections (2) and (3) do not contain specific advertising requirements, the provisions of subsection (1) also pertains to subsections (2) and (3). I also believe, although it is not specifically covered, notice should be given by registered or certified mail to riparian owners when the bulkhead line is established pursuant to subsection (2). This reasoning is based upon the similarity of this provision and subsection (4).

Your question is answered in the negative.

058-21—January 22, 1958

CRIMINAL PROCEDURE

INDETERMINATE SENTENCE, MINIMUM SENTENCE—

§§921.17-921.23 AND 811.11, F. S.

To: *Richard O. Culver, Director, Division of Corrections, Tallahassee*

QUESTION:

When a defendant is convicted for the larceny of cattle, does the trial court have the authority to impose an indeterminate sentence of from two years to five years?

This question is answered in the negative upon the authority of my opinion 057-389, dated Dec. 19, 1957, a copy of which is enclosed herewith.

My conclusion is not affected by the fact that §811.11, F. S., provides for imprisonment in the state prison for not less than two years nor more than five years for the larceny of cattle. Section 811.11 has been on the statute books for many years and it still requires that a sentence of not less than two years be imposed whenever a defendant is sentenced to a definite term of imprisonment. However, its provision for a minimum term of two years is inapplicable when an indeterminate sentence is imposed under authority of Ch. 57-366, (now §§921.17-921.23, F. S.), because said 1957 statute mandatorily requires that when an indeterminate sentence is imposed it shall be for a term of "6 months to the maximum period of imprisonment authorized by law" and the prescribed form of sentence set forth therein is to the same effect. When an indeterminate sentence is imposed for larceny of cattle, the mini-

imum sentence of six months required by said 1957 statute is applicable, rather than the minimum of two years provided by §811.11.

058-23—January 24, 195

NOTE
TAXATION OF INTEREST IN FIRM OR PARTNERSHIP OR

REVISED AND SUBSTITUTED BY 058-331
\$6199.02, 199.07, 200.08, 47.15,
\$2675.15, 61 F.

APPEARING ON PAGES 912-917 OF THIS VOLUME
16. *Green v. State Controller, Tallahassee*

QUESTIONS:

1. Where a member of an unincorporated firm, or a partner in a general or limited partnership, having its principal office or place of business in this state is a resident of this state, is his interest in the firm or partnership, or in the firm or partnership property, subject to taxation in this state?

2. Where a member of an unincorporated firm, or a partner in a general or limited partnership, having its principal office or place of business in another state is a resident of this state, is his interest in the firm or partnership, or in the firm or partnership property, subject to taxation in this state?

The above questions extend to personal representatives of deceased members or partners who were citizens or residents of this state at the time of their death. It seems that one interest in question was that of a deceased resident or citizen of this state who, at the time of his death, was both a general and a limited partner in a limited partnership in another state.

"Property owned by a partnership is properly taxed in the name of the firm, and not in the name of an individual member thereof, although assessment in the name of a member will not necessarily invalidate the tax, and the partnership property may be considered as owned by the partners for the purpose of taxation" (84 C. J. S. 219, §106). The general rule seems to be that "the property of a copartnership should be assessed to it in its firm name. Real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly, giving the names of all" (84 C. J. S. 774, §404; see also 61 C. J. 637, note 52). Cooley states that "property of a partnership is generally with much propriety required to be taxed at the place where the partnership business is carried on; and it should be assessed in the firm name" (3 Cooley on Taxation, 3rd Ed. 1236-7, §1105). Under Florida Statutes persons, firms and corporations are required to make tax returns of personal property owned by them or under their control, management or custody (§§199.07 and 200.08, F. S.) thereby indicating the possibility that such property should be assessed in the firm name instead of and to each individual partner as his interest may appear. Where negotiable paper of a partnership has been dishonored notice thereof need only be served on one of the partners (§675.15, F. S.). Provision is made in §47.15, F. S., for the bringing of a suit in law or at equity against the partnership as a separate entity and the service of process on a single partner, which binds the partnership property but not the

property of each individual partner. This section tends to treat a partnership as a separate entity for some purposes.

"The common law rule that a partnership cannot hold legal title to real property does not apply to personal property. The personal property of a partnership is owned not by the partners individually, but by the partnership" (40 Am. Jur. 202, §107; see also 68 C. J. S. 502, §§70, 202 and 107. "Where real estate is acquired in a partnership business, and for partnership purposes, it will be treated as partnership property, though the legal title be taken in the name of one of the partners or in the name of a stranger . . ." (Proctor v. Hearne, 100 Fla. 1180, 131 So. 173, text 177 and cases cited). There is no dower interest in partnership real estate (Price v. Hicks, 14 Fla. 565; Loubat v. Nourse, 5 Fla. 350) superior to the rights of partnership creditors. The distinction between a "partnership" and a "joint adventure" must be kept in mind (Johnston v. Albritton, 101 Fla. 1285, 134 So. 563; Willis v. Fowler, 102 Fla. 35, 136 So. 358), the principal difference being that a joint adventure is usually limited to a single enterprise (Albert Packing Corp. v. Fickling Prop., 146 Fla. 362, 200 So. 907). "It is well settled that the joint effects of a partnership belongs to the firm, and not to the partners, and that a partner has no individual property in any specific assets of the firm . . . Instead, *the interest of each partner in the partnership property is his share in the surplus after the partnership debts are paid . . .*" (40 Am. Jur. 209, §114). "A limited partner's interest in the partnership is personal property" (§620.18, F. S., a uniform law). The purchaser at an execution sale, pursuant to an execution against a partner and not the partnership, takes no title to specific property but becomes a tenant in common with the remaining partners. He merely acquires the interest of the partnership. There are some authorities holding that his right against the partnership property is the same as the partner and that partnership debts are prior to his interest on liquidation (68 C. J. S. 739, §240). The rule seems to be that partners do not, as individuals, own the firm property, but that it is held by, and belongs to, the partnership as such, and the partners do not, as individuals, have any specific interest in any particular asset or particular part of the assets, nor can a partner assign or transfer an undivided share in any specific articles belonging to the partnership (68 C. J. S. 525, §85). This appears to be the rule in Florida, New York and other states.

Many cases recognize that businesses operated under modern methods may acquire a business situs different from that of their owners for some purposes (Anno. in 76 A. L. R. 806-829 and 143 A. L. R. 361-389), including purposes of taxation. This rule has been applied to partnership businesses (Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N. W. 548, L. R. A. 1915C 922, Ann. Cas. 1912B 756). It follows that partnership *personal property* should usually be assessed in the name of the partnership and not to the partners individually or in the nature of trustees; and that partnership real property may properly be assessed in the name of the firm, although assessment in the name of the members jointly or one or more of them will not invalidate the assessment. Where title to real property is vested in the individual names of members of a partnership care should be taken to ascertain whether such title is held for the use and benefit of the partnership or as tenants in

common or joint tenants for other than partnership purposes. This disposes of the assessment of partnership property for purposes of taxation and brings us to the question of the taxation of the interest of the partners in the partnership.

The interest of a partner in partnership property has been said to be a mere chose in action (*Re. Dumarest's Estate*, 262 N. Y. S. 450; *State v. Elsbury*, 63 Nev. 463, 175 P. 2d 430). "It is property, or, more precisely, personal property, regardless of the character of the property owned by the partnership, and is susceptible of being seized under legal process, as well as being sold, assigned or mortgaged." (68 C. J. S. 526, §85). Under §199.02, F. S., "shares of incorporated or unincorporated companies" are classified as class "B" intangible personal property. Partnership interests were held intangible personal property in *Wooten v. Okla. Tax Com.*, 185 Okla. 259, 91 P. 2d 259; in *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. ed. 749, the court said that "the interest of a partner was the right to receive a sum of money equal to his share of the net value of the partnership after a settlement, and this right to his share is a debt owing to him, a chose in action, and an intangible." The value of the interest of a partner in the partnership would be his share in the surplus after the partnership debts and obligations have been paid or provided for; it would not be measured by the gross value of the partnership property. Care should be taken in arriving at this value.

The above questions should each be answered in the affirmative. Each partner's interest in the surplus of the partnership, after the payment or the arrangement for the payment of partnership debts and obligations, is subject to taxation as intangible personal property. The property subject to taxation is the partner's interest in the net worth of the partnership and not his interest in the gross value of the partnership property. The interest of a personal representative in his decedent's partnership interest would likewise be subject to taxation. The partner's interest in the partnership and the partnership property are different kinds or types of property. We have considered no question of tax exemption.

058-24—January 24, 1958

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—ENFORCEMENT BY CERTAIN OFFICIALS—LIABILITY OF INSURER—§§322.221, 322.27, 320.25, 320.58, 320.64, 324.051(2), 324.061, 324.15 AND 324.151, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. An individual's driving privilege is under suspension for failure to comply with the financial responsibility law, Ch. 324, F. S. He is subsequently called in by the department of public safety for re-examination under §322.221, F. S., and it is learned that his driving privilege is under suspension by the financial responsibility department. May the department of public safety require the surrender of his license for transmittal to the financial responsibility department?

2. An individual's motor vehicle registration and

motor vehicle license are under suspension for his failure to comply with the financial responsibility law, Ch. 324, F. S. It subsequently comes to the attention of an agent of the motor vehicle department in the discharge of his duties that the individual's registration and license are under suspension. May the agent require the surrender of the registration for transmittal to the financial responsibility department?

3. An individual who is the owner of two motor vehicles has an accident involving one of them. Pursuant to §324.051(2), F. S., the registrations of both vehicles are suspended by the financial responsibility department. The owner subsequently deposits securities in compliance with §324.061, F. S., with respect to claims for injuries to persons or property and also obtains insurance in accordance with §324.151, F. S., covering only the vehicle involved in the accident. Later the second vehicle is involved in an accident. Could the owner claim exemption under the financial responsibility law on the basis that he had already complied with said law?

4. An individual who is the owner of two motor vehicles has an accident involving one of them. The owner secures insurance covering only the vehicle involved in the accident and the insurer files certificate SR-22 to the effect that the policy affords the coverage required by §324.151, F. S. Later the 2nd vehicle is involved in an accident. Would the insurance company be liable for the damage caused by the 2nd vehicle by virtue of its filing said certificate SR-22?

The questions are answered in their numbered order as follows:

1. Section 322.27, F. S., gives authority to the department of public safety to suspend and revoke drivers' licenses under a number of circumstances. This section has the following proviso: "This section shall in no way affect the power of the department of public safety to suspend licenses under the financial responsibility law." Although there is no express grant of power to the department of public safety to suspend a driver's license for failure of the holder to comply with the financial responsibility law, we feel that it is necessarily an implied power of the department of public safety in view of the general authority of the department and in view of the above-quoted language of §322.27. This question is answered in the affirmative.

2. Section 320.58, F. S., provides that license inspectors may be appointed by the governor "to enforce the provisions of the laws of this state relating to the registration of motor vehicles." This is the only section of Ch. 320, F. S., which deals with motor vehicle registrations and licenses, that refers to enforcement of any provisions other than the chapter itself. Section 320.64, F. S., enumerates the grounds for suspension of motor vehicle licenses by the motor vehicle department and §320.25, F. S., provides for the taking up of any license which has been obtained by false and fraudulent representation. Although there is no express authority, other than to license inspectors, to enforce a suspension of a motor vehicle registration and license under the financial responsibility law, we feel that the power to take up a suspended registration and

license is an implied power of the motor vehicle department in view of the general authority and responsibility accorded that department. This question is answered in the affirmative.

3. Section 324.051(2), F. S., the sanctions section of the financial responsibility law, does not apply "To such operator or owner if such owner had in effect at the time of the accident an automobile liability policy with respect to the motor vehicle involved in the accident." The financial responsibility department has the authority to suspend all motor vehicle registrations of an owner of a motor vehicle involved in an accident in order to enforce compliance with the financial responsibility law as to the vehicle which was involved in the accident. However, subsequent accidents involving any vehicle are still within said law if at the time of the accident there is not in effect insurance of the required amount covering the vehicle involved. This is true whether the accident involves the owner's 2nd vehicle which has never been insured, or involves his 1st vehicle after the insurance on it has lapsed. This question is answered in the negative.

4. Section 324.151, F. S., requires that a motor vehicle liability policy in order to be proof of financial responsibility shall insure the owner of the designated vehicle and any other person operating the designated vehicle with the express or implied permission of the owner. The policy must also insure the owner while operating "any motor vehicle not owned by him." There is no requirement that the policy cover all vehicles owned by the policyholder. Since the insurer only certifies by certificate SR-22 that the policy complies with §324.15, F. S., it incurs no liability with reference to other vehicles owned by the policyholder but not designated in the policy. This question is answered in the negative.

058-25—January 24, 1958

COURTS

JURY DUTY—EXEMPTION, CHIROPODISTS—§§40.08, 461.04, 231.05, 250.50, 470.27 AND 466.21, F. S.

To: *Heywood A. Dowling, Board of Chiropractic Examiners, Jacksonville*

QUESTION:

Are chiropractors in the actual practice of their profession in this state exempt from jury duty?

As to the classes of persons who are exempt from jury duty particular statutory provisions control. (50 C. J. S., Juries §153, p. 873). Such exemptions, however, are in the nature of a personal privilege which may be waived, (*Crosby v. State*, 90 Fla. 381, 106 So. 741).

The provision of the Florida Statutes which relates generally to jury duty exemption is §40.08, F. S., and, as to those engaged in pursuits of a medical nature, exempts "practicing physicians and surgeons."

In addition to §40.08, supra, there are other provisions of the statutes which specifically exempt members of certain professions from jury duty, e.g., dentists are exempt under §466.21, funeral directors and licensed embalmers are exempt under §470.27, national guardsmen while on active duty under §250.50, and members of the teaching profession while engaged in such work under

§231.05, F. S. However, there is no specific exemption for chiropractors; therefore, if such an exemption exists it would have to be predicated on the theory that they are included within the term "physicians and surgeons" as contained in §40.08, *supra*.

In an effort to determine whether chiropractors are within the term "physicians and surgeons" as contemplated by the legislature, recourse was made to Ch. 461, F. S., relating to the practice of chiropractic. The statutory definition of chiropractic contained therein failed to imply that the practitioner is a physician and surgeon within the contemplation of §40.08, *supra*. However, the converse is implied in §461.04, F. S., wherein the legislature proclaims that the chapter relating to chiropractic shall not be applicable to "licensed physicians and surgeons in this state."

In light of such pronouncement it is the opinion of this writer that the legislature, in employing the term "physicians and surgeons" in the statute exempting certain persons from jury duty, did not intend to include those practicing the profession of chiropractic.

Your question is answered accordingly.

058-26—January 24, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
APPOINTMENT OF COUNTY SCHOOL SUPERINTENDENT
AS DEPUTY SHERIFF—§15, ART. XVI; §6, ART. VIII,
STATE CONST.**

To: Homer W. Brooks, Sheriff, Flagler County, Bunnell

QUESTION:

May a county school superintendent be legally appointed a bonded deputy sheriff, to serve without compensation?

Section 15, Art. XVI, State Const., provides:

No person holding or exercising the functions of any office under any foreign Government, under the Government of the United States, or under any other State, shall hold any office of honor or profit under the government of this State; and no person shall hold, or perform the functions of, more than one office under the government of this State at the same time; Provided, Notaries Public, militia officers, county school officers and Commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office.

Deputy sheriffs are "officers" within the meaning of the above cited constitutional provision (*Blackburn v. Broreine, et al.*, 70 So. 2dn 293).

The proviso in said provision, however, that county school officers may be "elected or appointed to fill any legislative, executive or judicial office" would, in my opinion, be applicable to your question since a county school superintendent is a county school officer (§6, Art. VIII, State Const.).

Although it might be contended that a sheriff or deputy sheriff by the nature of his duties may not be classified as holding a "legislative, executive or judicial office," I believe that said language was intended to be an all-inclusive delineation of the various types of offices contemplated by the Florida constitution.

It is therefore my opinion that a county school officer such as a county school superintendent could also serve as a bonded deputy sheriff without pay, assuming that his duties as a deputy would not prevent him from properly discharging his duties as school superintendent.

Your question is therefore answered in the affirmative.

058-27—January 24, 1958

CRIMINAL PROCEDURE

COMMITMENTS—ISSUANCE BY CLERK—§§909.07, 921.02, 921.01 AND 921.05(2), F. S.

To: *J. Louie Carter, Clerk, Criminal Court of Record, West Palm Beach*

QUESTION:

When a sentence is pronounced in chambers, is the clerk authorized to issue a commitment for imprisonment?

It is the policy of the law that pleas shall be entered and judgments and sentences imposed in open court. Section 909.07, F. S., requires that every plea be pleaded orally in open court. Section 921.02 requires, among other things, that if the defendant has been convicted a judgment of guilty (an adjudication by the court that the defendant is guilty (§921.01)) shall be rendered in open court. Section 921.05(2) requires that when judgment of guilty has been rendered, sentence shall be pronounced in open court.

However, whether or not these statutory requirements are complied with is the responsibility of the court and, regardless of compliance or noncompliance, I think that it is the clerk's duty to issue a commitment whenever the court imposes a sentence providing for the imprisonment of the defendant, whether unconditionally or as an alternative punishment to be suffered in the event of the defendant's failure to pay a fine imposed upon him.

058-28—January 24, 1958

CRIMINAL PROCEDURE

INDICTMENTS, CONTENTS WHEN CHARGING PERSONS AS SECOND OFFENDERS UNDER §849.25(2), F. S.—§§775.08 AND 775.11, F. S.

To: *Richard E. Gerstein, State Attorney, Miami*

QUESTION:

Where a person who has been convicted of book-making contrary to §849.25, F. S., thereafter violates said statute, is it necessary to charge the previous conviction in the information charging the 2nd offense in order to justify the imposition of the enhanced penalty which said statute permits to be imposed upon a defendant who, having been convicted of violating it, thereafter violates it?

Subsection 2 of §849.25 provides as follows:

849.25 . . . (2) Whoever engages in bookmaking shall be guilty of a misdemeanor and, upon conviction, shall

be punished by imprisonment in the county jail for not less than 90 days nor more than 1 year; provided that any person who, having been convicted of violating this act, thereafter violates this act, shall be punished, upon conviction, by imprisonment in the state prison for not less than 1 year nor more than five years.

The effect of this statutory provision is to make the 1st violation thereof a misdemeanor and to make it a felony to violate it after having been convicted thereunder. (Section 775.08 specifies that any crime punishable by death or imprisonment in the state prison is a felony.)

I find no statute authorizing supplementary proceedings to be instituted after the 2nd conviction for violating said statute, for the purpose of subjecting the defendant to the enhanced penalty authorized thereby for a subsequent offense. (Section 775.11, one of our habitual criminal statutes, authorizes such supplementary proceedings when all of the convictions charged are for felonies, but this statute does not apply to a 2nd offender against §849.25 because under the latter section the 1st conviction is for a misdemeanor.)

Therefore, the general rule set forth in the following quotation from 25 Am. Jur. 272-273, Habitual Criminals, §26, is applicable:

In the absence of controlling statutory provisions to the contrary, and despite some authority to the contrary, the general rule is that in order to subject an accused to the enhanced punishment as a second or subsequent offender or as a habitual criminal, it is necessary to allege in the indictment or information the fact of a prior conviction or convictions. This is the English rule and also the rule under some statutes. Such allegation in the indictment is necessary in order that the defendant be clearly informed of the charge he is called upon to meet, and because the indictment must always allege every fact affecting the degree of punishment. The general rule does not apply under the statutes and circumstances permitting proceedings to be brought for the determination of the status as a subsequent offender after disposition of the principal subsequent offense.

To the same effect, see 42 C. J. S. 1057, Indictments and Informations, §145-b(1)(a); *Smith v. State*, 75 Fla. 468, 78 So. 530; and *Sparkman v. State Prison Custodian*, 154 Fla. 688, 18 So. 2d 772, and authorities therein cited.

Therefore, it is my opinion that your question is properly answered in the affirmative.

058-29—January 27, 1958

LIQUORS AND BEVERAGES

BEVERAGE LAW, ADMINISTRATION—CONSTRUCTION OF §561.44, LICENSING VENDORS NEAR CHURCHES OR SCHOOLS

To: *Oliver J. Semmes, Jr., City Manager, Pensacola*

QUESTION:

Where there is a hospital owned by one of the orders of the Catholic church, located within the confines of a municipality, in this case, Pensacola, in which hospital

there is located a chapel where mass is said daily, would this chapel be considered a church in so far as applicability of laws governing the sale of alcoholic beverages is concerned?

Section 561.44(1), F. S., authorizes incorporated cities and towns to establish zones by ordinance wherein vendors of alcoholic beverages may be permitted to conduct their places of business and this authority relates to every type of licensee, except packaged beer for consumption off the premises only, and the municipality can, by such zoning ordinance, require vendors of alcoholic beverages to be certain distances from *established churches* or schools.

This office held in opinion 052-37, dated Feb. 11, 1952, that where instruction in elementary and high school subjects is given under direction of and by personnel of the public school system of a county to children confined in a crippled children's hospital, *there is an established school* upon the hospital premises within the purview of §561.44, F. S.

We assume, from the information contained in your telegram, that the chapel is principally for the benefit of the sisters who operate the hospital and the priests and that regular services where parishioners may receive religious teaching and training and engage in worship in this chapel are not provided. Based on this assumption, it is my opinion that such a chapel, located in a hospital, could not be classified as an established church within the intent and purpose of §561.44(1), F. S.

058-30—January 28, 1958

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—APPLICATION OF §324.051(2), F. S., OPERATOR OF LEGALLY PARKED MOTOR VEHICLE

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

Must an individual comply with Chapter 324, F. S. "Financial Responsibility" if his vehicle is legally parked (that is, within the confines of a place so designated for parking) and the individual:

1. Opens the door on the street side into a moving lane of traffic thereby causing a collision?
2. Opens the door, alights from the vehicle and is standing on the pavement when a collision occurs?
3. Is standing by his vehicle on the street side preparing to open the door and is struck by an oncoming motorist?

Section 324.051(2), F. S., provides that under certain circumstances the operator of a motor vehicle involved in an accident does not have to comply with the provisions of Ch. 324, F. S., "Financial Responsibility." One of the enumerated circumstances is that "The motor vehicle was legally parked at the time of such accident. . . ."

In A. G. O. 055-220, 1955-56 Biennial Report, p. 282, we expressed our belief that a vehicle which is temporarily stopped in a lane of traffic waiting for a red light is not "legally parked" so as to come within the exception to Ch. 324, F. S. The instant question assumes that the vehicle is parked in a proper place but

asks if under certain circumstances the exception would not apply.

The 1st question assumes that the door of the parked vehicle is projected into a lane of moving traffic. This would necessarily mean that the whole vehicle was not, at that time, within the confines of the space designated for parking. It is my opinion that a motor vehicle is not "legally parked" within the meaning of §324.051(2), F. S., when a door or other part of the vehicle extends into a lane of moving traffic.

Questions 2 and 3 assume that the whole vehicle is within the parking space but at the time of the collision the operator has not yet abandoned the vehicle or has returned to the vehicle with the intent of resuming operation of the vehicle. Since, in these circumstances, it is assumed that the whole vehicle is within the space designated for parking, we find no reason to hold that the vehicle is not "legally parked" within the meaning of §324.051(2), F. S.

Accordingly, question 1 is answered in the affirmative and questions 2 and 3 are answered in the negative.

058-31—January 28, 1958

TAXATION

DOCUMENTARY STAMP TAXES—EMINENT DOMAIN PROCEEDINGS AND DECREES

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are judgments and decrees in eminent domain proceedings by which title to real property is vested in a condemner subject to state documentary stamp taxes?

Eminent domain may be said to be the process by which property of a private owner is taken for public use, without his consent, but upon the award and payment of just compensation, and being in the nature of a forced sale and in which the condemner stands toward the owner as buyer toward seller. A transfer of title by the judgment or decree in an eminent domain proceeding is not a "deed," or a sale, within the definitions contained in federal regulations applicable to the enforcement of the federal documentary stamp taxes, and is, therefore, apparently not subjected to federal documentary stamp taxes. The Florida Statutes was patterned after and taken from the federal statute on the same subject. The power of eminent domain is a right of sovereignty (18 Am. Jur. 645, §19) by which private property is taken for public use. The taking of private property for utility service purposes is for a public use, although title may vest in a corporation. The court processes by which private property is taken for public purposes is the exercise of a state instrumentality, which is not subject to taxation unless expressly made so (See annotation in 76 L. ed. 828, et seq.).

26 C. J. S. 581-584, §1, relating to "deeds," 30 C. J. S. 215-6, §457, relating to "eminent domain," 47 C. J. S. 790-2, §549, relating to "internal revenue," and 18 C. J. S. 90-94, relating to the definition of "conveyance" have been examined in this connection.

In the light of the above and foregoing authorities we failed to find any authority for the levy and assessment of documentary stamp taxes against decrees and judgments of courts in eminent domain proceedings. The question is, therefore, answered in the negative.

058-32—January 28, 1958

PUBLIC FUNDS

COUNTY BONDS ISSUED FOR PUBLIC BUILDINGS PURSUANT TO §135.01, F. S., AS COLLATERAL SECURITY REQUIRED FOR BANKS, DEPOSITORIES FOR PUBLIC FUNDS—§§18.10, 18.11; §6, ART. IX, STATE CONST.

To: J. Edwin Larson, State Treasurer, Tallahassee

QUESTION:

Are special county building certificates issued by Dade county for the purpose of courthouse and jail construction under §135.01, F. S., acceptable as securities to be given by banks of this state in connection with the deposit of moneys of the state therein, as contemplated by §§18.10 and 18.11, F. S.?

Section 135.01, F. S., provides that a board of county commissioners may levy a building tax not exceeding five mills per annum for not more than 30 years for the purpose of erecting or repairing any courthouse, jail or other public building. Pursuant to this section the board of county commissioners of Dade county has levied upon all property within Dade county subject to taxation a special building tax of two mills in each fiscal year for 15 years, beginning with the fiscal year 1957-58, for the purpose of financing a jail and a criminal court building. Special county building certificates in the face amount of \$14,500,000 are in the process of being issued. These certificates are payable as to principal and interest solely from the tax levy described above. The certificates are not general obligations of Dade county. There is no indication that these certificates have been approved by the freeholders of Dade county in an election as contemplated in §6, Art. IX, State Const.

Section 18.10, F. S., provides that the governor, comptroller, and state treasurer may deposit the money of the state in such banks of the state as will offer satisfactory collateral security. Section 18.11, F. S., provides that the collateral to be given by such banks to secure state deposits shall consist of "bonds of the United States, and the bonds of the several states, county and municipal bonds, and county or county school time warrants. . . ."

In opinion 050-108 (B. R. of the Attorney General 1949-50, p. 194) we stated that the term "state, county or municipal bonds" does not usually embrace any but general obligation bonds. In opinion 050-352 (B. R. of the Attorney General 1949-50, p. 30) we held that county bonds issued pursuant to §135.01 are not acceptable as collateral to secure state deposits in state banks unless the bonds have been issued in pursuance of the full requirements of §6, Art. IX, State Const.

Inasmuch as the special county building certificates in question are not general obligations of Dade county and are payable solely from a two-mill tax levy, and there is no indication that the said certificates have been issued in pursuance of the full requirements of §6, Art. IX, State Const., it is my opinion that said certificates may not be accepted as security for deposits of state funds as required by §§18.10 and 18.11, F. S.

Your question is answered in the negative.

058-33—January 29, 1958

**REGULATION OF PROFESSIONS AND VOCATIONS
PROFESSIONAL ENGINEERS—PROHIBITIONS AND PENAL-
TIES THEREFOR RELATING TO EMPLOYMENT—
§§471.31, F. S.**

To: Florida State Board of Engineers Examiners, Gainesville
QUESTION:

Does Ch. 471 and particularly §471.31, F. S., prohibit a professional engineer, duly registered in the state, who owns, operates and conducts his own construction business, under a fictitious name duly recorded in accordance with the laws of the state, from charging as part of a lump sum amount for the construction of a completed structure, a certain amount for engineering services, it being understood that if he does not obtain a contract that he receives no fee for any time which he might have spent in appraising the proposed work or for any engineering that might have been done?

The question you present boils down to whether or not a contractor can operate as his own engineer and charge as a portion of the over-all bid price for the completed structure a certain amount for his engineering services incurred in connection therewith.

Section 471.31, F. S., provides as follows:

471.31 Profit from employment.—It shall be unlawful for any person employed in the practice of professional engineering to participate in or derive any profit from the subject matter of his employment, either in the matter of construction work or materials, other than the compensation he is to receive for such work by virtue of his contract for professional employment.

It is clear that this statute relates to a situation where a professional engineer is employed by a person, firm or corporation to render professional engineering services on a definite project and in such case it would be against public policy for the professional engineer to derive profit or compensation from materials furnished by materialmen to the job or from construction work. However, in a so-called "package" deal, when the person, firm or corporation desiring to have a building or project constructed knows that the contractor is also his own engineer, then, in my opinion, §471.31 would not be violated.

The above position is borne out by certain provisions in the "Canons of Ethics" of the engineering profession of Florida. Sections 15, 16 and 17 of the code, which deal with relations of clients and employers, provide as follows:

Sec. 15. The engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, without the consent of all interested parties.

Sec. 16. The engineer will not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with his client or employer in connection with work for which he is responsible.

Sec. 17. The engineer will not be financially interested in the bids as or of a contractor or competitive work for which he is employed as an engineer unless he has the consent of his client or employer.

It seems clear that if the engineer's client or employer in the question you presented, the person for whom the construction is being done, knows that the engineer is bidding on the job as a contractor and that any engineering services he may render are a part of the completed job, then I do not believe that §471.31, F. S., would prohibit his acts.

058-34—January 31, 1958

STATE OFFICERS AND EMPLOYEES

CONTINUOUS RESIDENCE REQUIRED, §112.02, F. S.

To: Angus Laird, Director, Florida Merit System, Tallahassee
QUESTION:

Is there any provision in the state statutes which requires that an employee of the state reside in the state?

For the purpose of this opinion, it will be assumed that the situs of the employment is in Florida, inasmuch as it is occasionally necessary for the state to employ the services of persons in foreign states and countries for services to be performed therein.

A necessary consideration for a proper determination of your question is the following language of §112.02, F. S., relating to the residence requirement of state employees:

All persons employed to work for the state or for any county of the state, shall be bona fide residents of the state for two years next prior to such employment, *except only where after due diligence no person can be found in the state possessing the required qualifications necessary to the particular employment.* (Emphasis supplied.)

Aside from the italicized exception, it is apparent that two years residency is a necessary prerequisite to employment by the state or a county thereof. The term "residence" employed in the foregoing statute means legal residence, an essential element of which is the intention to *permanently maintain legal residence* in the state. (See 1956 Atty. Gen. Op. 505, and cases cited therein.)

The use of the term "residence" and the meaning ascribed to it by the courts as including the intent to permanently maintain such residence reflects the intent of the legislature that a state employee who engages in such employment principally within the state must continue to maintain such residence as a condition of employment.

The foregoing should not be construed in any wise as preventing a state employee from acquiring temporary residence outside the state. The initial showing of legal residence and the presumption of the continuous maintenance thereof is not disturbed in the absence of a manifestation of intent to the contrary, as for example: registering to vote or acquiring homestead exemption in another state.

Your question is answered accordingly.

058-35—January 31, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIRED STATE AND COUNTY EMPLOYEES HOLDING
PUBLIC OFFICE—WAIVER OF COMPENSATION AND
TRAVEL EXPENSES—§§122.02, 122.16, 471.08
AND 471.09, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a retired state employee, drawing retirement pay under Ch. 122, F. S., hold office as a member of the state board of engineering examiners and continue to draw his retirement pay, provided he waive his per diem or travel expenses, or both?

"Any person who has accepted and is receiving retirement compensation under this chapter shall have such compensation suspended *during any period of reemployment in any capacity whatsoever by the state or any political subdivision*, or any department, branch, or agency thereof . . ." (§122.16, Florida Statutes). The phrase "state and county officer or employee" includes "all full time officers or employees who receive compensation for services rendered from state or county funds . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not; provided that such compensation in whatever form paid *shall be specified in terms of fixed monthly salaries* by the employing state or county agency or state or county official and shall not include amounts allowed for professional employees for special or particular service or for subsistence or traveling expense . . ." (§122.02, F. S.). (Emphasis supplied.)

The Florida state board of engineering examiners exists under and by virtue of §471.08, F. S., and its members appear to be officers of the state. Section 471.09, F. S., provides that "each member of the board shall receive ten dollars per day, or any part of a day, while attending official board meetings, not to exceed twelve meetings per year, and shall receive per diem and mileage as provided . . ." The said ten dollars per day appear to be compensation for official services rendered; however, it is not "specified in terms of fixed monthly salaries . . ." (see above quotation from §122.02, F. S.). State and county officers and employees as defined in §122.02(1), F. S., would not seem to include state officers whose compensation is ten dollars per day while attending official meetings. This seems to bring us to the question of whether the *reemployment* mentioned in §122.16, F. S., must be upon a salary or compensation "in terms of fixed monthly salaries," or may it be upon any compensation, such as the ten dollars per day provided by statute to members of the board of engineering examiners; or does it include employment without regard to the compensation paid. Generally, state officers are to be distinguished from state employees (*Landis v. Futch*, 122 Fla. 837, 165 So. 907).

Although we feel that the above authorities would justify an affirmative answer to the above question, we further feel that the person in question has such a stake in the retirement system that he

might be taking a chance on losing his retirement rights should he accept such an appointment without first having the question determined by the courts.

058-36—January 31, 1958

CRIMINAL PROCEDURE

DOCKET—STATUS OF CASE ON ABSENTEE DOCKET—TRANSFER FROM ACTIVE DOCKET BY CLERK—§915.01, F. S.

To: *J. Louie Carter, Clerk, Criminal Court of Record, West Palm Beach*

QUESTIONS:

1. Are cases placed on the absentee docket active, inactive, or disposed of?
2. Does the clerk have the authority to remove cases from the active docket of the court when they are ordered transferred to the absentee docket?

In my opinion 051-186, dated June 30, 1951 (1951-1952 A.G.R., p. 771), I expressed the following views:

As to the legal status of a case on the absentee docket, I think that such a case is subject to the control and disposition of the court. From a legal standpoint, I see no difference between the status of a case which is on the absentee docket and the status of a case which is not on said docket, both being pending and subject to the orders of the court; except, however, that, as held by the Supreme Court in *Likens v. State*, 16 So. 2nd 158, a defendant whose case is on the absentee docket is not disqualified for jury duty upon the theory that he is "under prosecution," affirmative action being necessary to revive the prosecution of a case which is on the absentee docket.

A case on the absentee docket may be in a state of quiescence or suspension, but it is still in court and is still subject to the control of the court.

* * * * *

Unless a case runs afoul of §915.01, F. S. (hereinafter discussed under question 3), or is finally disposed of by order of the court, I think that it will remain alive and operative indefinitely. This is true of cases on the absentee docket as well as those on the active docket.

I still adhere to the views thus expressed and therefore it is my opinion that a case placed on the absentee docket is neither active nor disposed of but is inactive.

As to your question 2, I think that when a case is "transferred" to the absentee docket it is necessarily taken from the active docket and placed on the absentee docket and that therefore when the court orders a case transferred to the absentee docket the clerk is authorized to take it off of the active docket.

058-38—February 4, 1958

CRIMES

RAPE—PENALTY UPON RECOMMENDATION OF MERCY BY MAJORITY OF JURY—§§794.01 AND 919.23(2), F. S.

To: *Richard E. Gerstein, State Attorney, Miami*

QUESTION:

What penalties may be imposed upon a person who is

convicted of rape and recommended to the mercy of the court by a majority of the jury in their verdict?

Section 794.01 F. S., provides that a person who commits rape—

... shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge.

On the other hand, §919.23(2) says that:

Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life; ...

Section 794.01 governs as to the penalty to be imposed for the capital offense of rape when a majority of the jury recommend mercy in their verdict, because its penalty provision is a later expression of the legislative will than is §919.23(2). The latter section was enacted as a part of the criminal code in the year 1939, whereas the provision in §794.01 for imprisonment in the state prison for life or for any term of years within the discretion of the judge when a majority of the jury recommend mercy, was added to said section when it was amended in 1947. The very purpose of the 1947 amendment of §794.01 was to make it possible for the trial judge to mitigate the punishment for rape when a majority of the jury recommend mercy and the circumstances are such as to make it too harsh to impose a life sentence. The whole idea behind the amendment was to make it possible for the trial judge to adjust the penalty for rape, when mercy is recommended, by sentencing the defendant to serve a term of years, any term of years, instead of sentencing him to life imprisonment as was theretofore required by §919.23(2).

Since the latest expression of the legislative will governs in case of conflict between two statutory enactments, §794.01 is controlling as to the penalties for rape, with the result that when a person convicted of rape is recommended to mercy by a majority of the jury in their verdict he may be sentenced to imprisonment in the state prison for life or for "any term of years" within the discretion of the judge.

058-39—February 4, 1958

CRIMINAL PROCEDURE

APPEALS—EFFECT OF SUPERSEDEAS UPON JUDGMENT OF TRIAL COURT—LOSS OF CIVIL RIGHTS

To: Carl Holmer, Jr., Supervisor of Registration, Miami

QUESTION:

Are the civil rights of a person found guilty in U. S. district court of illegal sale of narcotics lost to him upon such conviction if he appeals the case to a higher court, or are they lost only when the conviction is upheld by such higher court?"

The right to vote and the right to hold office are among the civil rights of a Florida resident, and there is authority to the effect that when an accused is convicted of a crime which disqualifies him

to be a voter, such disqualification attaches immediately and is not suspended by his appeal and the furnishing of a supersedeas bond (see 29 C. J. S. 59, Elections, §33-b); and that where a statute provides that an office shall be deemed vacant on conviction of a felony, an appeal from such a conviction does not stay the creation of a vacancy (see 67 C.J.S. 208, Officers, §50-a).

However, in an advisory opinion to the governor, reported in 78 So. 673, 674, the supreme court of Florida, in considering the question of whether a vacancy in office exists where the incumbent has been convicted of a felony and has obtained a supersedeas pending review by the supreme court, said:

While an officer may be suspended from office "for the commission of any felony," the office is not "deemed vacant" under section 298 of the General Statutes, except upon "conviction," and a conviction is not operative while a supersedeas is effective. When an office becomes vacant, it may be filled as the law provides." (Emphasis supplied.)

Since the right to hold office is a civil right, and since the supreme court thus in effect said that there is no vacancy in office because of a conviction so long as the conviction is not operative because of the effect of a supersedeas on appeal, it appears that no civil right is lost because of a conviction, followed by timely appeal and supersedeas, until the appellate court affirms and the supersedeas is no longer effective.

Also, I note that in *Joyner v. State*, 30 So. 2d 304, the supreme court of Florida considered the question of whether an appeal and supersedeas following Joyner's fourth conviction of felony stayed the effectiveness of such conviction so as to render him immune from being subjected to a life sentence as a fourth felony offender under the habitual criminal statutes pending his said appeal. The supreme court said:

If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court.

* * * * *

The judgment of conviction referred to in the information as the fourth conviction of a felony was at the time of the filing of the information, and at the time of the trial, not final and effective and, therefore, such judgment could not at that time be relied upon as a basis for the information and proof thereof was not sufficient to support the conviction." (Emphasis supplied.)

While a man's civil rights may not be considered as important as his freedom from being subjected to a life sentence, they are nevertheless rights of great value, and since Joyner's appeal and supersedeas following a fourth felony conviction stayed the effect of the conviction and prevented the imposition of a life sentence as a fourth felony offender, I see no reason why an appeal and supersedeas following a conviction which results in the loss of civil rights does not stay the effect of the conviction and prevent the conviction from forfeiting the civil rights of the convicted person. I think that it does.

To summarize, I think that when a conviction, whether state or federal, results in the loss of civil rights in Florida, and when a person suffers such a conviction and takes a timely appeal and

obtains a supersedeas, the conviction is not final and his civil rights are not lost until the conviction is affirmed and the supersedeas is no longer effective.

058-40—February 5, 1958

CRIMINAL PROCEDURE

GRAND JURY—DISCLOSURE OF TESTIMONY BY WITNESS, PROHIBITED, EXCEPTIONS—§905.27, F. S.

To: Richard E. Gerstein, State Attorney, Miami

QUESTIONS:

1. Can a witness disclose his own testimony given before a grand jury under provisions of §905.27, F. S.?

2. If a witness testifies before a grand jury without taking secrecy portion of the oath and subsequently discloses his testimony is he subject to contempt proceeding?

Section 905.27, F. S., reads as follows:

905.27. Testimony not to be disclosed; exceptions.—*No grand juror, prosecuting attorney, or special legal counsel, court reporter, interpreter, OR ANY OTHER PERSON APPEARING BEFORE THE GRAND JURY, shall disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that of the witness given before the court, or to disclose the testimony given before the grand jury by any person upon a charge against such person for perjury in giving his testimony or upon trial therefor, or when permitted by the court in the furtherance of justice. Any person violating the provisions of this act shall be guilty of a criminal contempt of court, and punished accordingly.* (Emphasis supplied.)

The purpose of this statute appears to be to insure that no person appearing before a grand jury shall disclose the testimony of any witness examined before the grand jury except when required by a court under one of the circumstances specified in the statute. Said statute imposes the obligation of secrecy not only upon grand jurors, prosecuting attorneys, special legal counsel, court reporters and interpreters but also upon "any other person appearing before the grand jury" and these quoted words are broad enough to include, and I think that they do include, witnesses. What testimony is forbidden to be disclosed by a witness or other person except under court order? It is "the testimony of a witness examined before the grand jury," and I interpret the statute to forbid a witness to disclose his own testimony before the grand jury except under court order as well as the testimony of other witnesses. The underlying purpose of the statute, to impose secrecy, would be as much circumvented by permitting each witness to go out and disclose his own testimony as it would be circumvented if the state attorney or a grand juror should disclose the testimony of the several witnesses.

Therefore, in answer to your 1st question, it is my opinion that a witness cannot lawfully disclose his own testimony before a grand

jury except when required by a court for one of the purposes permitted by said statute.

As to your 2nd question, the application of §905.27 to a witness does not depend upon the form of the oath taken by him before a grand jury and I think that said statute is just as applicable to a witness who does not take an oath of secrecy as to one who does take such an oath. It is therefore my opinion that a witness who, not having taken an oath of secrecy, discloses his testimony before the grand jury otherwise than under court order is guilty of a criminal contempt of court, and to punishment therefor, by virtue of the concluding sentence in §905.27.

If a witness before the grand jury should desire to disclose his testimony "in the furtherance of justice" the statute imposes the burden upon him of obtaining a court order requiring such disclosure before he proceeds to make it.

058-42—February 10, 1958

CORPORATIONS AND BUSINESS TRUSTS

STATE REQUIREMENTS OF FOREIGN LIMITED PARTNERSHIPS—§§620.01, 620.02(1)(b) AND 613.07, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Does a foreign limited partnership need to procure a certificate from the secretary of state in order to be eligible to do business in Florida?

The limited partnership is a statutory creature unknown at common law (40 Am. Jur. 474, Partnerships, §505). In the instant case a foreign limited partnership falls in a category all its own somewhere between the general partnership and the foreign corporation. On the one hand it has been held that a nonresident general partnership may do business in Florida without qualifying with the secretary of state (A. G. O. 052-84, 1951-52 Biennial Report, p. 754). At the other extreme, an entire chapter (Ch. 613) of the Florida Statutes, is devoted to regulation of the foreign corporation. Just where the nonresident limited partnership fits in between the two extremes is a novel question to this office. The ideal situation would exist if special statutory provisions relating to the regulation of foreign limited partnerships had been enacted. In the absence of such statutory provisions, this opinion is rendered with the idea in mind of attempting to bring the foreign limited partnership within the meaning of the existing law.

Florida has adopted the uniform limited partnership act and it is without question applicable to all domestic limited partnerships. Section 620.01, F. S., defines a limited partnership:

Limited partnership defined.—A limited partnership is a partnership formed by two or more persons under the provisions of §620.02, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Section 620.02 (1) (b) provides: ". . . and no such limited partnership shall do business in this state without first having obtained the certificate of authority of the secretary of state for the ensuing year." (Emphasis supplied.)

Inasmuch as a limited partnership is a statutory creature, it follows that it cannot extend its operation beyond the jurisdiction of the statutes creating it. To do so would create a situation similar to the fish out of water which dies for lack of the air mixture found only in its place of original creation. A nonresident corporation must abide by its charter which is authorized by the statutes of the state of residence. Although at common law a corporation was bound only by its charter and could operate in any jurisdiction under the terms of that charter such is no longer the case since every state has enacted statutes regulating the operation of foreign corporations.

Insofar as the nonresident aspect is concerned, the foreign limited partnership stands in essentially the same shoes as does the foreign corporation. There is some authority to the effect that foreign limited partnerships should be treated as foreign corporations (23 Am. Jur. 26, Foreign Corp. §14). American Jurisprudence makes the following comments with reference to the authority of a foreign corporation to carry on activities in jurisdictions other than the state of residence:

... A clear distinction exists, however, between domestic corporations and corporations organized under the laws of other states. Such corporations fall naturally into their respective classes. Over the one—that which the state has created—the state has certain powers of supervision and control, while the other is, apart from activities within the state itself, in many respects beyond its jurisdiction . . .

With respect to governing rules in the law of foreign corporations, it must be constantly borne in mind that no state has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises in other states. It may confer powers, in the nature of a commission, to be exercised anywhere, on condition that their exercise be assented to by the state or sovereignty where their exercise is sought; but without this assent, express or implied, such powers would be nugatory outside the state granting them. This is on the principle that the laws of a state can have no binding force, *proprio vigore*, outside the territorial limits and jurisdiction of such state. No rule of comity will allow one state to charter corporations to operate in another state unless there is willingness on the part of the foreign state that it should be so . . . (23 Am. Jur. 27, Foreign Corp., §15).

Since Florida has no provision for reciprocity or comity, the statutes of another state creating the foreign limited partnership are of no effect in Florida.

The writer has not lost track of the idea that Florida has enacted the uniform limited partnership act, but nowhere in the act is the subject of reciprocity discussed. The apparent objective of the uniform limited partnership act was to establish uniformity among the states so that those dealing with limited partnerships in several states could anticipate control and regulation by similar if not identical laws. At best a foreign limited partnership which is not registered with the secretary of state could operate only as a general partnership in Florida. This is particularly true in the instant case where the foreign limited partnership desires to purchase property in Florida. The property would be purchased in the name of the partners and there would be no way to distinguish the

limited partners from the general partners from the deed or any other record in Florida.

Since the limited partnership is a statutory creature and thus different from the general partnership, it is my opinion that public policy dictates that a foreign limited partnership be regulated in some way prior to being allowed to do business in Florida. As pointed out above, there is some authority to the effect that foreign limited partnerships should be treated as foreign corporations. However, the partnership does not contain the same character of a separate entity as does the pure corporation. The separate entity is only partially applicable to the limited partnership simply because the partnership aspect is retained.

Section 613.07, F. S., does not appear, however, to bring a limited partnership strictly within the definition of a foreign corporation in Florida. It is, therefore, my opinion that a nonresident limited partnership to be treated as a limited partnership must comply with the same law applicable to resident limited partnerships until other applicable legislation is enacted. Otherwise the limited partners subject themselves to possible future judicial declaration that they occupy the same status as general partners in this state. This conclusion is supported by the above quoted wording found in §620.02, F. S., which implies that *all* limited partnerships doing business in this state will obtain a certificate of authority from the secretary of state.

The above information appears to answer your question.

058-43—February 13, 1958

STATE FUNDS

ARBITRATION AWARD—PAYMENT OF INTEREST

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the state comptroller authorized to honor a voucher or to issue his warrant to the treasurer directing him to pay out of the state treasury, interest, whether accrued or in futurity, upon the amount of an award in arbitration regularly made, filed and recorded, in which adjudication in full is stated to be a specific sum of money "without interest"?

The question presented is answered negatively.

The question under consideration had the attention of the supreme court of the U. S. in the October term 1889, *U. S. v. State of North Carolina* wherein it was held in a well-reasoned opinion (136 U. S. 519) that interest is not awarded against a sovereign government unless its consent has been manifested by an act of its legislature, or by a lawful contract of its executive officers. The court further pronounced the principle that even though the statutes fixed a maximum rate of interest that could be imposed upon judgments, such statutes do not apply to claims against the state, in the absence of an explicit statute so providing, even upon a sum certain which is overdue and unpaid.

The question presented has engaged the attention of the supreme court of Florida. In a recent decision of our supreme court pronounced in April 1956, the court defined the sole question presented as being whether the Florida livestock board, a

state agency, was liable under the facts stated and applicable statutes for interest upon a judgment. The subject case was not decided upon the state statute authorizing the charge of interest upon judgments generally, but rather based its conclusions upon the statute authorizing suits against the livestock board, as a body corporate and the "sue and be sued," as well as all other rights and immunities usually enjoyed by bodies corporate. The livestock board case was in the language of the court "controlled by our decision of *Treadway v. Terrell*, 158 So. Rep. 512."

Treadway was a suit upon the award of a board of arbitration, as is the case under consideration. It is held in *Treadway* that the allowance of interest as a part of the award is a matter to be determined by the board of arbitration in the exercise of its sound discretion. So in the present case the board, in the exercise of its discretion, found that the amount of the award was sufficient to compensate the contractor for the extra work done, without the allowance of interest accrued or in futurity and so specifically declared.

The use of the words "without interest" in a contract, award and verdict has had judicial recognition and consideration. In the case of *re Vancamp Products Co.*, decided by the U. S. court of appeals for the 7th circuit, reported in Vol. 107 Fed. 2d at p. 568, the circuit court of appeals interpreted the words to mean that no interest upon the amount found to compromise the claim by a certain amount of money "without interest" was definite and certain. The court expressed its interpretation in the following language, viz:

... We are not impressed with appellant's argument that the words "without interest" had reference to accrued interest. To give such effect to the words is to make them meaningless. A proposal to compromise for \$120,000, omitting any reference to interest, undoubtedly would have accomplished the same purpose. That would have been an offer to compromise all amounts due and owing appellant, principal and interest, as well. Assume for a moment the reverse of the situation—that is, that appellant had proposed to compromise for \$120,000, with interest. Would anyone contend then that such proposal had reference to other than future interest?

I am further supported in my conclusion by decisions of the supreme court of Florida in *State ex rel Boulevard Mortgage Co. v. Thompson*, in which the verdict of a jury was in the following form:

We the jury find for the plaintiff and assess its damages at \$50,000 for principal only.
and cases therein cited.

058-44—February 14, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENT
SALE OF SECURITIES—COOPERATIVE SYNDICATE—
AGREEMENTS, SOUTHEASTERN INVESTMENT
COMPANY—CH. 517, F. S.**

To: *Florida Securities Commission, Tallahassee*

QUESTION:

Are cooperative syndicate agreements under which

funds are raised for the purpose of financing the construction and sale of cooperative apartments or apartment buildings, and under which the syndicate members are to share in any profits on the ratio of their contributions, securities within the purview of Ch. 517, F. S.?

We have before us the copy of cooperative syndicate agreement wherein and whereby the participating members of the syndicate pay sums of money to a corporation who holds the funds in the nature of a trustee for the cooperative investment group. When the amount contributed by the participating members of the group reaches a named sum the corporation may use such sum for the purpose of financing the cooperative apartment building. When the building is completed the several apartments in the said building are either sold or rented to purchasers or lessees. When the apartments in the building are disposed of any profits are divided among the syndicate members in ratio to the several amounts invested. The agreement makes provision for assessments against participating members should the total sum contributed be insufficient to complete the building, and where any of such participating members fail to pay said assessments into the trust fund their contributions previously made are forfeited to the said corporation. No mention is made as to whether the amount forfeited is payable into the syndicate trust or to the corporation itself.

The term "security" as used in Ch. 517, F. S., regulating the sale of securities in this state, *includes any certificate of interest or participation, certificate of interest in a profit sharing agreement, or the right to participate therein, investment contract, or beneficial interest in title to property, profits or earnings, interest in or under a profit sharing or participation agreement or scheme, or any other investment commonly known as a security.* (§517.02(1), F. S.).

This office in its opinion of Feb. 8, 1950 (050-72) held that agreements between the operator of a farm and certain contributors of funds to be used in the operation of the farm were securities within the purview of Ch. 517, F. S., where the profits derived from the operation of the farm were to be divided between the farmer and the contributors. Agreements relating to farming (Securities and Exchange Commission v. Universal Service Ass'n, CCA 7th, 106 Fed. 2d 232), fox farming (Securities and Exchange Commission v. Payne, DC, 35 Fed. Sup. 873), tung oil farming (Securities and Exchange Commission v. Tung Corp., DC, 32 Fed. Sup. 371), where the investor was to receive a share of the profits, have been held to be within the federal act. Reference may also be made to the annotation in 163 A. L. R., especially pages 1052, 1053 and 1055. Agreements that represent interests whereby funds are invested in an enterprise with the understanding that profits earned through the operation of the enterprise will be divided with the investors, have usually been held to be securities under state securities laws. However, when such agreements are not profit-sharing ventures or provide for participation in the profits, they are usually held not to be within the securities laws. (Commerce Clearing House Blue Sky Law Reporter, §1611 and authorities cited).

These observations lead us to the conclusion that the cooperative syndicate agreements described in the above stated question are evidently within the purview of Ch. 517, F. S., and subject to regulation thereunder. The above stated question is tentatively answered in the affirmative.

There is an indication in the file that the cooperative syndicate agreements in this case are now involved in litigation; this being true §517.21, F. S., would seem to be available to the litigants and under which the status of such agreements as securities may be determined judicially. There may be grounds for an investigation by the board to determine whether or not §517.30, F. S., may have been violated.

058-45—February 14, 1958

TAXATION

TAXATION OF PRISON FARM LANDS IN BRADFORD AND UNION COUNTIES—§§192.10 AND 192.21

To: Board of Commissioners of State Institutions, Tallahassee

QUESTION:

May the tax assessors or the boards of county commissioners for Bradford and Union counties, when assessing prison farm lands pursuant to §192.10, F. S., fix the value of such lands when assessing them upon the tax rolls?

We are advised, from the request for opinion and otherwise, that valuations of such lands have been increased by the county taxing authorities to \$10 per acre on the 1957 tax rolls from the \$3 per acre placed on said lands on the 1956 tax roll. We have been furnished with copies of tax returns, made by the superintendent of the Florida state prison to the tax assessors for Bradford and Union counties, for 1956 tax assessments wherein the prison farm lands were returned on the basis of \$3 per acre for the 1957 tax year. We are not advised of the making of any tax returns, either by the board itself or any of its agents, to either county, for the 1957 tax year.

Under said §192.10, F. S., "the board of commissioners of state institutions annually before the first day of March shall list all lands owned or used as the state prison farm in Bradford (and Union) county, Florida, excepting from such list five hundred acres in a contiguous body . . . and place the valuation on all lands as above described . . . upon the same basis that similar lands are valued upon the tax books of said county and forward such list and valuation of lands to the tax assessor of said county The tax assessor of said county shall enter upon the tax rolls the description and valuation as made by the said board, and the county commissioners of said county shall not change or alter such description and valuations." (Emphasis supplied.) Provision is also made in said section for the payment of the taxes assessed and levied in accordance with its requirements. Section 192.10 originated as Ch. 7402, 1917, and appeared in the Revised General Statutes, 1920, as §§698-700 thereof. There has been no material change in the said law since its enactment in 1917.

Although said §192.10 makes no mention of Union county, wherein a part of the prison farm lands are located, it is noted

that Union county was not established and created until 1921 (Ch. 7402, 1917) by which act a large portion of the prison farm lands became a part of Union county. We hold that said §192.10 applied to prison farm lands located in both counties. Section 192.08, F. S., is noted in this connection together with the provision therein that "only upon the approval of such levy by the state agency or department in which title to such lands . . . is vested, or having jurisdiction over such lands . . ." No question is here raised about the continued application of said §192.10; however, in this connection reference might be made to *State v. Webb, Fla.*, 49 So. 2d 93, decided in 1950.

Presuming the continued application of §192.10, it seems to have been intended as a waiver of the state's right to tax exemption as the sovereign. The right under the statute to tax prison farm lands is not an absolute right but is a limited one. One of the limitations seems to be the right of the board of commissioners of state institutions to fix the valuation of the lands for tax purposes instead of the tax assessors. The statute requires that the "board of commissioners of state institutions, annually before the first of March, shall list all lands owned or used as the prison farm . . . and place the valuation on all the lands as above described . . . upon the same basis that similar lands are valued upon the tax books of said county and forward such list and valuation of lands to the tax assessor of said county . . ." The tax assessors are required to use the descriptions and valuations, as furnished him by the board of commissioners of state institutions, when making up the tax roll. The statutes prohibit any change in such valuation by the board of county commissioners. Said §192.10 is a limited authority to the counties to tax prison farm lands, but does not seem to vest in them, or the county commissioners, any power or authority to make an independent valuation of prison farm lands or change the valuations fixed in the tax returns to be filed by the board of commissioners of state institutions.

Said §192.10 imposes upon the board of commissioners of state institutions a duty to determine the value to be placed upon prison farm lands for tax purposes, and to fix that value on the same basis as the valuation of similar lands by the county taxing authorities upon the county tax rolls. The ultimate duty to fix such valuation is imposed upon the board and not on its employees; although the board would seem to have the power to delegate to employees and agents the duty of investigating and obtaining evidence as to the ratio of valuation by the county taxing authorities of like and similar lands, similarly located. It seems to be the duty of such commissioners of state institutions to annually fix such values and make and execute a tax return to the tax assessors in accordance with said §192.10. Should the tax assessor feel that the valuations in the tax returns or any of them are not "upon the same basis that similar lands are valued upon the tax books of said county," he may not change the same himself, but would seem to be at liberty to protest the same to the board of commissioners of state institutions supplementing his said protest with evidence as to the ratio of the valuations placed by him on like and similar lands to that fixed in the tax return filed by the said commissioners of state

institutions. Should the said commissioners deem that the evidence submitted by him would justify a further investigation as to such value they may make such further investigation and if any error be found in such valuations the same may be corrected at any time prior to equalization of the tax roll.

We find no evidence of any tax returns having been made by the board of commissioners of state institutions for the 1957 tax year; this poses the question of the procedure to be followed by the tax assessor. "The tax assessor of said county shall enter upon the tax rolls the description and valuations as made by the said board, and the county commissioners of said county shall not change or alter such description or valuations." This statute prohibits the fixing of such valuations by the tax assessor even when the board of commissioners of state institutions fails to make the required return. The proper procedure, in case no return is filed by the commissioners of state institutions, would seem to be to use the last return made as the one to be followed, or to request that a return be made by the said board as required by §192.10. This is the procedure that should have been followed for the 1957 tax year; however, the same was not followed. We deem the 1957 tax assessment invalid, except insofar as it may have followed the 1956 tax return, and should not be recognized by the board of commissioners of state institutions. It would seem proper for the board to pay the taxes based upon the 1956 tax returns if acceptable to the county officials. We deem the 1957 assessment to constitute an "act of omission or commission on the part of the tax assessor. . . which may be corrected at any time by the officer or party responsible for the same . . ." (§192.21, F. S.).

The above question is, therefore, answered in the negative; however, without prejudice to the tax assessors to correct the tax rolls under §192.21 should they so desire, where the assessment was not made in accordance with the 1956 tax rolls; and also without prejudice to the board of commissioners of state institutions to nunc pro tunc make a tax return for 1957 taxes should such a return be acceptable to the county officials. Although such tax returns are required to be made by March 1 of the tax year, such duty is doubtless a continuing one. It is suggested that the board of commissioners of state institutions make it the continuing duty of one or more members of its personnel to obtain necessary information and prepare annually tax returns for its execution and delivery to the tax assessors of Union and Bradford counties.

058-46—February 14, 1958

CRIMINAL PROCEDURE

COUNTY COURT—PLEA INCONSISTENT TO CHARGING AFFIDAVIT

To: *Comer White, County Judge, Bonifay*

QUESTION:

When a charge of driving while intoxicated is pending in the county court, and it appears that the evidence is not sufficient to sustain a conviction for said offense but is sufficient to sustain a conviction for reckless

driving, does the county judge have the authority to accept a plea of guilty to reckless driving in the drunk driving case, without a new affidavit charging reckless driving?

A judge has no authority to accept a plea of guilty to a charge which is not pending before him. When only a charge of driving while intoxicated is pending against a defendant, there is no charge of reckless driving pending before the court, because a charge of reckless driving is a completely different charge from a charge of driving while intoxicated and is neither a lesser degree thereof nor a lesser offense included therein. Therefore your question is properly answered in the negative.

This opinion is in keeping with my opinion 049-81, dated March 2, 1949 (1949-1950 Attorney General's Biennial Report, p. 55).

058-49—February 14, 1958

COURTS

COURTS OF RECORD, DEFINITION—JUSTICE OF THE PEACE COURTS—§§36.02, 81.31, 932.56, 937.18, 941.07, 941.08, 941.26, F. S.; §11(2), ART. V, STATE CONST.

To: *Rodney Thursby, Sheriff, Volusia County, Deland*

QUESTIONS:

1. Which courts of Volusia county are considered courts of record?
2. Is the justice of the peace a judge of a court of record within the purview of §941.26, F. S.?

AS TO QUESTION 1:

A court of record has been defined as a court proceeding according to the common law that is required to keep a written record of its acts and judicial proceedings (see 14 Am. Jur., Courts, §7). Moreover, any court so designated by its enabling statute would be a court of record (see 21 C. J. S., Courts §5). It has been held that a court of record must have a clerk whose duty it is to keep the record of the court (*Tourtlot v. Booker*, Texas, 160 S. W. 293). Moreover, it has been held that a court of record is an entity separate and apart from the person holding the office (*U. S. v. Hall*, 5 N. Mex. 178, 21 p. 85).

Thus, any court in Volusia county that would fall within the purview of the above general rules would constitute a court of record. This would clearly include the circuit court for the 7th judicial circuit, the county judge's court and the court of record of Volusia county.

AS TO QUESTION 2:

Section 941.26, F. S., controlling the waiver of extradition proceedings, provides in part:

Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in §§941.07 and 941.08 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence

of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; . . .

It is generally accepted that a justice of the peace court is not a court of record (*State v. Allen*, Ohio, 159 N. E. 591). However, I have been unable to find where the supreme court of Florida has decided this issue. Therefore, it becomes necessary to examine the nature of this court in light of these general rules stated above.

Unlike a circuit court and county court, the justice of the peace court has no clerk but, on the contrary, the justice is required to maintain his own docket (§§37.15 and 937.18, F. S.).

Moreover, it is my understanding that the justice of the peace is not required to maintain a record of the judicial proceedings before his court to the same extent as required by the circuit and county courts.

Further, §81.31, F. S., providing the manner in which instruments in the possession of the justice of the peace shall be transferred to his successor, implies that the justice is not necessarily a separate entity distinguished from the court over which he presides.

In view of the fact that a trial de novo may be obtained from a judgment of the justice of the peace court in a criminal case, it is clear that such a judgment does not enjoy the same stature as the judgments of other courts (§11(2), Art. V, State Const.; §932.56, F. S.).

Chapter 937, F. S., controls the proceedings in the justice of the peace courts and provides that its provisions shall apply also to the county judge's court. In light of the similarity of the proceedings in these courts, the fact that the county judge's court is designated by statute a court of record (§36.02, F. S.), while no such position is given to a justice of the peace court, shows clearly that the legislature never intended that justice of the peace courts should be courts of record.

Therefore, it is my opinion that the justice of the peace court is not a court of record, either at common law or by virtue of an enabling statute.

It is suggested that any written waiver of extradition proceedings as required by §941.26, F. S., be executed in the presence of a circuit or county judge and not in the presence of a justice of the peace.

058-50—February 14, 1958

COURTS

PAYMENT OF COURT REPORTER FOR TRANSCRIPT OF GRAND JURY TESTIMONY—§905.27, F. S.

To: *J. Henry Blount, County Attorney, Jacksonville*

QUESTION:

Who is responsible for the payment of an official court reporter's charges incurred where such official court reporter takes the testimony of the witnesses appearing before the grand jury and furnishes transcript thereof to an authorized state official?

For the purpose of this opinion, it is assumed that the

transcript of the testimony of witnesses before the grand jury furnished to "an authorized state official" was furnished to said official pursuant to an order of or with the permission of the court.

The services of the official court reporter, in connection with grand jury hearings, is a normal criminal expense to be paid by the county.

Testimony taken by an official court reporter in a grand jury hearing may be released by order of or with permission of the court for several reasons, one of which is the furtherance of justice (§905.27, F. S.).

The facts which are the basis of this opinion may be distinguished from those considered in attorney general opinion 050-426 wherein it was held that an official court reporter was not entitled to compensation for transcribing charges to the jury, in that the facts herein relate to proceedings of the county grand jury in performance of its duty to investigate questionable activities occurring within the county. Inasmuch as there is no statutory requirement that an official court reporter be present during grand jury hearings, when at the request of county officials an official reporter is employed to take notes of grand jury proceedings, the compensation of the official reporter may be considered an expense of the county in the operation of its grand jury.

It is my opinion that where a transcript of testimony taken before a grand jury has been furnished to "an authorized state official" by order of or permission of a court of the county in which the grand jury is convened, the responsibility of paying the court reporter furnishing such transcript is property the county's.

058-51—February 14, 1958

TAXATION

SEPARATE TAXATION OF MINERAL, OIL AND OTHER SUB-SURFACE RIGHTS—§193.221, F. S. (CH. 57-150)

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What procedure should be followed in the separate taxation of mineral, oil and other sub-surface rights under and pursuant to Ch. 57-150, 1957?

Section 1 of said Ch. 57-150, provides that "whenever the mineral, oil or other sub-surface rights in real property, *not to include a leasehold interest in said sub-surface rights*, shall have been sold or otherwise transferred by the owner of the fee, or acquired by reservation, such rights shall be taken and treated as real property and shall be subject to taxation separate from the fee, and it shall be the duty of the owner of such sub-surface rights to make return thereof for taxation by the first day of April. If a return is not made by the owner of the sub-surface rights, the duty is hereby imposed upon the tax assessor to assess said sub-surface rights for taxation and place it upon the tax rolls; *provided that such separate assessment shall be required only when the owner of some record interest in said lands shall file with the tax assessor of the county, prior to April first of the year a written*

request for such separate assessment of such mineral, oil or other sub-surface rights" (Emphasis supplied.)

The phrase "not to include a *leasehold interest* in said sub-surface rights," above emphasized, excludes from the operation of the statute *leasehold interests*. What are and what are not leasehold interests in minerals seem to be affected by local statutes and judicial theory; "the same instrument, which in one jurisdiction is held to sever the fee, may in another be held to operate merely as a license" or other right (Anno. in 16 A. L. R. 514). "It must be borne in mind that a conveyance of a royalty interest and the conveyance of minerals in place are two entirely different documents and convey entirely different interests, but that to the average man with no experience in such matters they appear so much alike as for one to be substituted for the other" (Neel v. Rudman, Fla., 33 So. 2d 234, text 237). Examples of the two type documents are set out in the above court opinion, reference to which is here suggested for a clearer understanding of the problem.

Our supreme court, in Miller v. Carr, 141 Fla. 318, 193 So. 45, text 48, quoted the following language from the opinion in Kelly v. Kees, 213 Pa. 295, 110 Am. St. Rep. 547, 62 A. 911, text 912, "In reaching his conclusion on the point reserved, the learned judge gave full recognition to the binding authority of Funk v. Haldeman, 53 Pa. 229, and the cases that follow it, wherein it was held that the grant of exclusive privileges to go on land for the purpose of prospecting for oil, the grantor to receive a part of the oil mined, as in this case, does not vest in the grantee any estate in the land or oil, but is merely a license or grant of an incorporeal hereditament . . . In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil. So much as is thus severed belongs to the parties entitled under the terms of the grant, not as a part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant." In this connection see also 51 C. J. S. 809, §202, and 58 C. J. S. 303 and 355, §§50 and 165.

Leasehold interests in sub-surface rights being excluded from the operation of said Ch. 57-150, the same may not be returned for separate taxation; *only where title passes or is reserved* to mineral, oil and other sub-surface rights in an instrument or agreement may the same be subjected to separate taxation under the said state. Leasehold interests, where no title to such minerals, oil or other sub-surface rights pass to the lessee, may not be returned for separate taxation. Separate assessment of such mineral, oil and other sub-surface rights should only be made when the owner of some record interest in said lands shall file a written return or request for separate assessment with the tax assessor. When such a return or request for separate assessment is made the tax assessor should fix the full cash value of such mineral, oil and other sub-surface rights, which in no case may exceed 10% of the total value of the surface rights (§2, Ch. 57-150). The total value of the land, where there is no separation of sub-surface rights, could not exceed full cash value;

this being true we doubt that the combined valuation of the separate surface and sub-surface rights could legally exceed the value of the land had there been no such separation.

Replying to the above stated question you are advised as follows:

Only sub-surface rights, as distinguished from leasehold interests therein, are within the purview of Ch. 57-150, and subject to separate taxation.

Sub-surface rights should not be separately assessed unless and until requested by the owner of record of some interest in the lands or returned by such owner for separate taxation.

Separate assessment should not increase the overall value of the lands for taxation purposes.

Although sub-surface rights are subject to separate taxation they should be taxed as a single assessment and not divided into numerous partial interests for assessment purposes.

058-53—February 17, 1958

**REGULATION OF PROFESSIONS AND VOCATIONS
PSYCHOLOGISTS—BASIC SCIENCE EXAMINATION—
§§456.02, 490.04, F. S.**

To: *M. W. Emmel, Board of Examiners in Basic Sciences, Gainesville*

QUESTION:

Is a practitioner of clinical psychology and speech pathology (speech correction) subject to the basic science examination?

Opinion 047-72, rendered by my predecessor in office, J. Tom Watson, held that the phase of psychology which deals with the actual treatment of an individual who is suffering from a mental condition is subject to the basic science law. I am in accord with this very exhaustively researched opinion which recognizes, for the purpose of the basic science law, that the practice of psychology is properly divisible into at least two branches or areas, i.e., the branch or area wherein the psychologist deals with an individual as a patient who requires remedial treatment because of a mental problem or defect, and the branch or area which does not deal with the individual as a patient, as such, but deals with such subjects as the application of psychological principles to business, industry and education. The latter branch would include practitioners who deal with or teach the principles employed in the psychology of learning, industrial psychology and personnel psychology, and would not properly be included within the term "healing arts" as defined and contemplated by the basic science law (§456.02, F. S.). However, the practitioner who applies psychological principles, such as those contained in physiological and abnormal psychology, to a person for the purpose of treating or correcting an abnormal mental condition, would be within the contemplation of the term "healing arts" as defined in the basic science law as systems, treatments, operations, diagnoses, prescriptions, or practices, for the ascertainment, care, relief, palliation, adjustment or correction of human diseases, ailments, deformities, injuries and unhealthy or abnormal physical or mental conditions.

Thusly has the basic science law been interpreted in respect to practitioners of psychology since the rendition of the above-mentioned opinion in 1947, i.e., the practitioner who consults with educational authorities, employers, and the like, concerning psychology connected with education, employment, etc., not being subject to the basic science examination, whereas the passing of such examination was a necessary requirement for the practitioner who applied psychological principles to a person for the purpose of treating or correcting an abnormal mental condition.

I understand, however, that a legislative act which was created subsequent to the above opinion, and which provided for the licensure of psychologists by a state board of examiners of psychology, prompted the above question. As to the requirements for certification to practice psychology, this act requires the applicant to pass an examination in psychology given by the board. In addition to such examination, the applicant must satisfy the board that he possesses the following qualifications:

- (a) is of good moral character,
- (b) is a citizen of the United States,
- (c) has received a degree of doctor of philosophy with a major in psychology from a university approved by the board as maintaining satisfactory standards or an equivalent degree in a field of psychology from a similarly approved university,
- (d) has had at least one year's experience in the field of psychology, of a grade, character, and time distribution satisfactory to the board. (Section 490.04(1), F. S.).

The act makes no mention of the basic science examination. However, the basic science law provides that:

No person shall be eligible for examination or permitted to take an examination for a license to practice the healing art or any branch thereof or be granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this chapter. This requirement shall be in addition to all other requirements now or *hereafter in effect* with respect to the issuance of such license. (§456.03, F. S.) (Emphasis supplied.)

The italicized portion of the foregoing quoted section reflects the authority of the legislature, in the exercise of its sovereign duty, to provide, when necessary, additional safeguards to "preserve health, to prescribe such restrictions and regulations as will fully protect the people from ignorance, incapacity, deception and fraud" (1941 A. G. O., 608, 610 (041-666)).

The act creating a state board of examiners of psychology (Ch. 490, F. S.) is a general law regulating the practice of psychology in the state. It contains no reference to the basic science law or to the dispensation of the requirement of a basic science examination contained in §456.03, *supra*. Hence, if this law is to be taken as an amendment to the Florida basic science law, it must be held to have become effective for such purpose solely by implication.

The elementary and generally accepted proposition that amendments by implication are not favored in law obtains with the usual fervor in the instant case. Before the courts will declare that one statute amends or repeals another by implication, it is

necessary to show that the statute later in point of time was intended as a revision of the subject matter of the former, or that there is such a positive and irreconcilable repugnancy between the two statutes as to indicate clearly that the later statute was intended to prescribe the only rule which would govern, and that there is no area in which the provisions of the statute first in point can operate lawfully without conflict (see *Ferguson v. McDonald*, 66 Fla. 494, 63 So. 915; *Sanders v. Howell*, 73 Fla. 563; 74 So. 802; *Town of Hollandale v. Broward County Kennel Club*, 152 Fla. 266, 10 So. 2d 810; *Miami Water Works Local No. 654 v. City of Miami*, 26 So. 2d 194). In my opinion the basic science law is not in conflict with or repugnant to, but implements the law creating the board of examiners of psychology.

In light of the foregoing, it is therefore apparent that in the licensure of psychologists by the newly created board of examiners in psychology a distinction is necessary in the certification and credentials issued so as to reflect properly the areas of psychology in which the successful applicant may properly engage.

Your question is answered accordingly.

058-54—February 17, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—SOCIAL SECURITY COVERAGE—
§§122.13, 122.23 AND 650.03, F. S.**

To: *Stanley C. Burnside, Clerk of Circuit Court, Dade City*
QUESTION:

Is the Florida industrial commission authorized to require the consolidation of social security reports by agencies of a political subdivision?

Your letter indicates that the above question was prompted by instructions from the Florida industrial commission to "the several clerks of boards of county commissioners that they must consolidate the social security reports for all of the county offices, hospitals, etc., in their respective counties."

Chapter 57-382, the latest pronouncement of the legislature on the subject of social security coverage for public employees, among other sections, created §122.23(3), F. S., which designates the comptroller as administrator of the system "as provided in §122.13." This section provides that "the state comptroller, by and with the consent and approval of the state budget commission, shall make such rules and regulations as are necessary for the effective administration of this chapter."

Chapter 57-382, *supra*, also created §122.23(5), F. S., which defines the term "state agency," as used in Ch. 122, as the Florida industrial commission within the provisions and contemplation of Ch. 650, F. S. This chapter provides, among other things, that the industrial commission shall make and publish such rules and regulations as it finds necessary or appropriate to the efficient administration of the function with which it is charged (§650.07, F. S.). One of the functions of the industrial commission, under Ch. 650, is to enter into agreements with the federal government for social security coverage of state and county officers and employees (§650.03, F. S.).

In light of the foregoing, it is apparent that while the comp-

troller is the administrator of the system of social security coverage for state and county officers and employees, the Florida industrial commission is charged with the responsibility of determining necessary procedures to comply with federal requirements in the administration of such coverage. These responsibilities are not in conflict. This appears to be an area in which the legislature apparently considered it wise and necessary to have concurrent jurisdiction.

In light of the foregoing observations, it is my opinion that the industrial commission is authorized to prescribe method and manner for the presentation of necessary reports in the administration of social security coverage for public employees.

058-55—February 17, 1958

EDUCATION—EXPLOSIVES

PERMITS REQUIRED FOR CONSTRUCTION OF ROCKET BY
SCHOOL CLASSES—§§552.091, 552.101, 633.05 AND
791.01-791.03, F. S.

To: *William S. Metcalf, Prosecuting Attorney, Ocala*

QUESTION:

What permits are required for a high school science club to construct under the supervision of a high school science teacher a rocket which is intended to reach an altitude of 2,000 feet and travel a distance of one mile?

Assuming that the rocket in question is to be propelled by an "explosive" as defined in Ch. 552, F. S., and that the science club intends to fire the rocket when it is constructed, it may well be that the project comes within the purview of §552.091, F. S.

Section 552.091 provides, in part, ". . . it shall be unlawful for any person to acquire, sell, possess, store or engage in the use of explosives except in conformity with the provisions of this chapter . . . must be possessed of a valid and subsisting license or permit issued by the state fire marshal. . . . License for user—\$1.00 . . . the forms of such licenses and permits and applications therefor shall be prescribed by the state fire marshal. . . ."

Section 552.101, F. S., provides "no person shall be possessed of an explosive unless he is the holder of a license or permit. . . ." Certain exemptions are provided by this act but they do not appear to be applicable to your question.

Section 633.05, F. S., provides that the insurance commissioner "shall make and promulgate regulations for the keeping, storing, use . . . or other disposition of highly flammable materials. . . . The term 'explosives' as used herein shall be construed to mean any mixture, compound or material capable of producing an explosion. . . ."

In accord with the above quoted statutes, it is my opinion that the science club in question should make a full disclosure of its rocket plans to the Honorable J. Edwin Larson, state insurance commissioner and fire marshal. If it is determined that the rocket project as planned will constitute a possible hazard to the public safety or to the persons involved in the project within the meaning of the above cited acts, a permit should be applied for as provided for by §552.091, F. S., and the project should be carried out in accord with applicable regulations promulgated by the in-

surance commissioner.

Furthermore, any existing municipal ordinances which may be applicable should be carefully complied with if the rocket project is to be conducted within the boundaries of a municipality.

The bond requirements provided by Ch. 791, F. S., relating to "fireworks" may be applicable if under the specific facts involved it is determined by the sheriff of the county in which the rocket is to be constructed or fired, that the rocket falls within the definition of fireworks provided in §791.01, F. S., and constitutes a public danger as contemplated by §§791.02 and 791.03, F. S. It is my opinion that the sheriff should be fully informed regarding the rocket project and that such rules and regulations as he may prescribe under the authority of §791.02, F. S., including the posting of a bond, should be complied with.

I am advised by the local office of the civil aeronautics authority in Tallahassee that a rocket or missile would be considered a nonguided aircraft if fired into the air and would involve an element of risk to aircraft in the vicinity. The science club should therefore notify the nearest communication station of the civil aeronautics authority of the time and place of the proposed rocket firing and other pertinent information. This should of course be done well in advance of the actual rocket firing so that notice can be given by the C.A.A. to all aircraft in the vicinity.

C.A.A. communication stations in Florida are located at the following cities: Pensacola, Tallahassee, Jacksonville, Gainesville, Cross City, Orlando, West Palm Beach, Miami, Key West, Tampa, Ft. Myers, Melbourne, Vero Beach and Daytona.

More specific information regarding C.A.A. regulations which may be applicable may be requested from the Regional Administrator, C.A.A., Box 1689, Ft. Worth, Texas.

058-56—February 18, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
MOTOR VEHICLE INSTALLMENT FINANCING, CH. 520, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a motor vehicle retail dealer, in connection with the sale of a motor vehicle, in this state receives a "retail installment contract" which contract is thereafter transferred to an out-of-state "sales finance company," by such retail dealer, is either the said dealer or the sales finance company required to be licensed under Ch. 520, F. S.?

We have before us several forms of contract for "retail installment transactions" in connection with the sale of motor vehicles in this state, from which it appears that in some cases the "retail installment contract" involved in a motor vehicle sales transaction may be in the first place a contract by and between the motor vehicle retail seller and the retail purchaser, or it may be a contract by and between sales finance company or a banking institution. In this connection we have examined contract forms used or recommended by the Universal C. I. T. Corp., General Motors Acceptance Corp., Time Finance Co., Old Kent Bank, and others, as well as a letter from the U. M. & M. Credit Corp., and other documents, some of

which have been licensed in this state as "sales finance companies," and others of which have not been so licensed. The usual contract form is devised as an agreement by and between the motor vehicle retail seller and the retail buyer which, after execution by both such parties, is assigned and transferred, under an assignment agreement and warranty or guarantee, by the motor vehicle seller to the sales finance company selected by him. These instruments in most, if not all, appear to be completed transactions by and between the seller and buyer prior to their assignment by the seller to the sales finance company. Retail installment contracts in such cases may be in form conditional sales contracts, written liens, mortgages and otherwise. Doubtless in most cases there is some general agreement by and between the retail seller and the sales finance company pursuant to which retail installment contracts are assigned to the sales finance companies.

Under the motor vehicle finance law of this state (Ch. 57-799; Ch. 520, F. S.) "*no person shall engage in the business of a sales finance company in this state without a license therefor as provided*" by said motor vehicle finance law; with certain exceptions not here material. A "retail installment transaction" occurs under the said law whenever a retail buyer purchases a motor vehicle from a retail seller "*at a time price payable in one or more deferred installments.*" Written instruments evidencing such transactions are referred to in the said law as "retail installment contracts." A "sales finance company" means a person engaged, in whole or in part, in the business of purchasing retail installment contracts from one or more retail dealers. . . . The term also includes *a retail seller engaged, in whole or in part, in the business of creating and holding retail installment contracts.* The term does not include the pledgee of an aggregate number of such contracts to secure a *bona fide* loan thereon." "The 'holder' of a retail installment contract means the retail seller of the motor vehicle under or subject to the contract, or, if the contract is purchased by a sales finance company or another assignee, the sales finance company or other assignee." (§520.02, F. S.). (Emphasis supplied.)

The "holder" of a retail installment contract being defined as meaning "*the retail seller of the motor vehicle, under or subject to the contract, or, if the contract is purchased by a sales finance company or another assignee, the sales finance company or other assignee*" there seems implicit in this definition the inclusion of the retail seller of the motor vehicle as a sales finance company only when he accepts the contract as his own intangible personal property, to either retain as his own or to find a purchaser, and not when he is in fact or in equity acting as the agent of the sales finance company. Where, under his agreement with a sales finance company under which the finance company takes all such paper received by him, a retail seller is in fact or in equity acting as agent of the sales finance company so that the finance company and not him is in fact or equity financing the transaction, such retail dealer is not the holder of the retail installment contract and therefore not a sales finance company under the motor vehicle sales finance law. In every such transaction in this state the retail seller, when he accepts the contract and delivers the motor vehicle, will be acting either as agent for a sales finance company or for himself; this being true, either the sales finance company or the retail seller must be licensed under said Ch. 520, F. S., otherwise the said chapter has no applica-

tion to the said transaction.

Unless either the retail seller or the sales finance company is registered under the motor vehicle sales finance law (Ch. 57-799; Ch. 520, F. S.,) the finance charges and interest allowed, as well as all other privileges and rights permitted, under the said law are inapplicable to the installment contract and such contract is subject to the interest limitations of the general law. Contracts held by unlicensed sales finance companies, unless purchased from licensed retail sellers under said motor vehicle sales finance law, providing the charges and interest allowed under said law, may be violative of the general usury statutes if in excess thereof.

The above question is, therefore, answered in the affirmative. We construe the motor vehicle sales finance law (Ch. 57-799; Ch. 520, F. S.,) as applicable to motor vehicle retail installment contracts only when either the retail seller or the sales finance company has qualified thereunder; unless and until either the retail seller or the sales finance company has qualified under said statute the rights and privileges of the said statute are not available to them, and the contract may not legally include the interest and charges allowed by the said statute, but are amenable to the general usury statutes.

058-57—February 18, 1958

LEGISLATION

COMPENSATION ACTS—TIME OF APPLICATION—CH. 57-987

To: *Bryan Willis, State Auditing Department, Tallahassee*

QUESTIONS:

1. When the maximum compensation that may be retained by a county fee officer is changed by a law that provides a certain amount as the maximum amount that may be retained by such officer out of the income of his office as his yearly or annual compensation, and the law does not specify any date as the date upon which the change is effective, at what date is the new amount effective?

2. If the answer to the 1st question is a date other than the effective date of the act, may a county fee officer, who has reported and paid over to the county his excess income calculated on the basis that the changed compensation was effective from the effective date of the act, recover the additional compensation that he would have retained if he had calculated his compensation on the basis that the change was effective on an earlier date?

3. At what time do the salary increases provided for in Ch. 30475, 1955 and Ch. 57-987, become effective?

AS TO QUESTION 1:

In each case the paramount rule of statutory construction is to ascertain the legislative intent (*State Dept. of Public Welfare v. Bland, Fla.*, 66 So. 2d 59; *Ervin v. Peninsula Tel. Co., Fla.* 53 So. 2d 647). To this extent each act of the legislature must be interpreted separately and individually.

If the acts in question became law in the middle of the year, which is usually the case with the legislative schedule such as it is (§2, Art. III, State Const.) and contain no effective date clause the

law will become effective in the year of enactment (*Glisson v. Hancock*, 132 Fla. 321, 181 So. 379; *State ex rel Gibbs v. Couch*, 139 Fla. 353, 190 So. 723). Assuming that the act becomes effective in the year of enactment and the language therein refers to "maximum annual salary" *without reference to any part of said annual salary* then it may be inferred that the legislative intent was to increase the salary of the fee officer involved for the entire year even though the act did not become effective until the middle of the year. It has been suggested that this is retroactive legislation. The writer does not agree but it is pointed out for the benefit of the advocates of that position that retroactive legislation is not prohibited. The question of semi-annual or partial application was dismissed after consideration of the following factors:

1. Assuming that the acts became law in the current year, they are effective in that same year which they became law (*Glisson v. Hancock*, supra; *State ex rel Gibbs v. Couch*, supra).

2. Assuming that the acts mention an annual salary only and make no attempt to break it down into *monthly increments* the law should be construed to apply to the entire annual salary and not a part of it.

3. Fee officers generally make their final annual accounting on the last day of the year, a date which is always prospective with relation to the effective date of the act.

4. As a practical matter it would complicate accounting procedures to make an accounting based on more than one statutory income figure. Practical application can be a determining factor in statutory construction (*Latham v. Hawkins*, 121 Fla. 324, 163 So. 709).

It has been suggested that applying the provisions of an act such as the one contemplated herein to an entire annual salary is not in accord with the Florida supreme court's decision in *State ex rel Bayless v. Lee*, 156 Fla., 494, 23 So. 2d 575. I do not agree. The question dealt with herein relates solely to fee officers and not to officers drawing monthly salaries from a source such as the general revenue fund. Therein lies the distinction between this opinion and the *Bayless* case. As pointed out above fee officers make their final accounting on the last day of the year which is always prospective in relation to the effective date of the act and their salary is computed on that day in accordance with the total net income of the office. On the other hand, salary officers generally receive a stipulated amount in equal monthly installments regardless of the income of the office.

It is my opinion that special acts such as the one under discussion relating to annual compensation of fee officers should be made applicable to the entire year in which they become effective.
AS TO QUESTION 2:

Based on the discussion in the answer to question 1 it is my opinion that an officer may recover the additional compensation that he would have retained if he had calculated his compensation on the basis that the compensation change was effective on the first of the year assuming that there was an excess income to the office sufficient to provide recovery of the additional income.

AS TO QUESTION 3:

Chapter 30475, 1955, and Ch. 57-987, are population acts providing salary increases for the officers named therein and each act states in substance that those officers:

... whose compensation for their official duties is made wholly or partly by fees or commissions, or by both, which receive as his yearly compensation for his official services from the whole or part of the fees or commissions so collected and earned, all of the net income from such office not to exceed ten thousand dollars *per annum*." (Emphasis supplied.)

Each act by its own provisions became effective in the year of enactment. Since each act provided for an increase in annual or yearly salary and each act became effective in the year of enactment, then in accordance with the discussion in the answer to question 1 above, salary increases provided in Ch. 30475 and Ch. 57-987 are effective as of Jan. 1, 1955 and Jan. 1, 1957 respectively.

058-58—February 20, 1958

TAXATION

TAX ASSESSMENTS AND COLLECTIONS UNDER DADE COUNTY HOME RULE CHARTER—§§11 AND 6, ART. VIII, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

The offices of county tax assessor and county tax collector having been abolished by the Dade county home rule charter, adopted pursuant to §11, Art. VIII, State Const., what procedure should be followed in the said county for the assessment and collection of ad valorem taxes?

Section 8.01, of the Dade county home rule charter, adopted under and pursuant to §11, Art. VIII, State Const., provides that "on May 1, 1958, the following offices are hereby abolished and the powers and functions of such offices are hereby transferred to the county manager who shall provide for the continuation of all the duties and functions of these offices required under the constitution and general laws of the state: County Assessor of Taxes, County Tax Collector" This same section of the home rule charter permits the tax assessor and collector to remain in their present or similar positions and receive their salary for the remainder of the term for which elected. The county board is also required by said §8.01, should other offices be abolished, to "provide for the continuation of the duties and functions of these offices under the constitution and general laws."

Section 11, Art. VIII, State Const., provides for the adoption, by the electors of Dade county, of a home rule charter for the said county. In this connection the said home rule charter "may abolish and may provide a method for abolishing from time to time all offices provided for by article VIII, section 6, of the constitution, or by the legislature, except the superintendent of public instruction, and may provide for the consolidation and transfer of the functions of such offices . . . provided . . . that if the said home rule charter shall abolish any county office or offices as authorized herein, that said charter shall contain adequate provision for the carrying on of all functions of said office or offices as are now or may hereafter be prescribed by general law" (paragraph vi, subsection a). The said section of the constitution also provides that

the said home rule charter "may grant full power and authority to the board of county commissioners . . . to levy and collect such taxes as may be authorized by general law and no other taxes . . ." (paragraph iv, subsection a). Said §11, Art. VIII, (subsection i) provides that "the provisions of this constitution and general laws . . . shall be the supreme law in Dade county, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this constitution and of the legislature in the enactment of general laws pursuant to this constitution." Said section and article further provide (subsection e) that the home rule charter "shall not conflict with any provisions of this constitution nor any applicable general law . . . except as expressly authorized in this section, nor shall any ordinance enacted in pursuance to said home rule charter conflict with this constitution or any such applicable general law, except as expressly authorized herein . . ."

Constitutional provisions relating to home rule are intended to enlarge rather than abridge the powers of local governments, their purpose being to secure to them a greater degree of home rule than they formerly possessed; and in order to carry out such intention such provisions should be liberally construed (20 C. J. S. 761, §6; 62 C. J. S. 270, §124; 37 Am. Jur. 713, et seq., §§102, et seq.). See also *Chase v. Cowart*, Case No. 28955, decided by the supreme court on Dec. 20, 1957, but not yet published. "An examination of the provisions of the . . . amendment as a whole shows that there was no intent or purpose to transgress or repeal any provision of the constitution or any state law of general application" (*Chase v. Cowart*, supra; *Gray v. Golden, Fla.*, 89 So. 2d 785, text 788). If the home rule charter, or any ordinance enacted pursuant thereto, transcends the amendment it will be subject to assault by any one unlawfully affected (*Dade County v. Kelly*, Case No. 28956, decided Dec. 20, 1957, but not yet published; *Gray v. Golden*, supra). Section 8.01 of the home rule charter abolished the offices of county tax assessor and county tax collector for Dade county, and transferred their powers and duties to the county manager requiring that he "provide for the continuation of all the duties and functions of these officers required under the constitution and general laws of the state." This seems to be in compliance with the requirement of the constitution that where offices are abolished the "charter shall contain adequate provisions for the carrying out of all functions of said office or offices as are now or may hereafter be prescribed by general law," and that the provisions that the constitution and the applicable general laws control over charter provisions and ordinances.

This brings us to a consideration of ordinance 57-4, passed and adopted on Aug. 21, 1957, which provides in part that "until May 1, 1958, the assessment and collection of taxes shall continue as provided by the general laws of the state. *Thereafter, the procedure therefor shall be prescribed by executive order of the manager*, and such functions shall be performed exclusively by the department of finance" (§7.03). The said ordinance requires that the head of the department of finance establish the divisions of assessment and revenue collection (§7.04). These divisions are to be managed by a division head. Under §7.05 of the said ordinance the head of the assessment division is required to assess "for tax purposes all real and personal property in the county in accordance with provisions of

the charter, the constitution and the general laws of the state." However, we do not find in the said ordinance a similar requirement to comply with requirements of the constitution and general laws in the collection of taxes and revenue.

When construing the provision in §7.03 of ordinance 57-4 that "the procedure therefor shall be prescribed by executive order of the manager," we must take into consideration the requirement in §8.01 of the county charter that the powers and duties of the offices abolished by said §8.01 are "transferred to the county manager who shall provide for the continuation of all the duties and functions of these officers *required under the constitution and general laws of the state.*" Paragraph (vi) subsection (a) of §11, Art. VIII, State Const., which requires, where offices under §6, Art. VIII, are abolished, that the home rule charter "shall contain adequate provision for the carrying on of all functions of said office or offices *as are now or may hereafter be prescribed by general law.*" Subsection (i) of said §11, Art. VIII, of the constitution, which provides that the constitution and general laws "shall be the supreme law in Dade county, Florida, except as expressly provided" in said §11, and that said §11 should be strictly construed to maintain such supremacy; also, that the home rule charter "shall not conflict with any provision of this constitution nor any applicable general law," except where expressly otherwise provided in said §11 of Art. VIII.

We are inclined to construe the above quoted provision in §7.03 of ordinance 57-4, that "thereafter, the procedure therefor shall be prescribed by executive order of the manager," as authorizing procedures in harmony with those prescribed by the general statutes and laws of the state for the collection of like taxes and revenue in other counties of the state. Said §7.03 does not appear to violate either the constitution or the county charter unless and until there should be an attempt to prescribe a procedure violative of the general statutes and laws of the state. Should a procedure be prescribed out of harmony with the general statutes and laws of the state such a procedure would seem to be unconstitutional and invalid, except insofar as such a procedure may be expressly provided for in §11, Art. VIII, of the constitution.

These observations seem to answer the above stated question as well as the same way now be answered.

058-59—February 19, 1958

TAXATION

TAXATION OF LEASEHOLD INTERESTS IN REAL PROPERTY OF STATE, COUNTY, ETC.—§192.06(1), (2); CHS. 199 AND 200, F. S.; §20, CH. 23338, 1945

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are leasehold interests in real property belonging to the state or one of its counties subject to ad valorem taxation?

2. Are leasehold interests in real property belonging to port authorities subject to ad valorem taxation?

The supreme court, in *Park-N-Shop, Inc.*, a Florida corporation v. Sparkman, decided Nov. 15, 1957, rehearing denied Jan. 23, 1958, not yet reported, held that the property of the several

counties of the state is immune from taxation, and this despite the provisions of §192.06(1) and (2), F. S. The court also held that leasehold interests from a county or county property were neither tangible personal property within the purview of Ch. 200, F. S., nor intangible personal property within the purview of Ch. 199, F. S. Under the common law leasehold interests for fixed terms are personal property, and so far as we are advised this rule has not been changed in this state. These observations seem to answer the 1st question in the negative; and this being true assessments of such property seem unauthorized and invalid.

Section 20, Ch. 23338, 1945, provides that the "Hillsborough County Port Authority shall be exempt from all taxation upon any and all of its projects and property, real and personal, tangible and intangible, to which it holds title, levied and assessed pursuant to the constitution and laws of the State of Florida, by any taxing unit." Doubtless other port districts and authorities have similar tax exemption provisions; however, in the light of the holding in the Park-N-Shop, Inc. case above mentioned, that leasehold interests issuing out of real property for terms are not personal property within either Ch. 199 (intangible personal property) or Ch. 200 (tangible personal property), F. S., and such leasehold interests not being real property under the laws of this state, we see no alternative but to hold that leasehold interests belonging to port authorities and districts are not subject to ad valorem taxation, unless there be some statutory provision, in the act establishing such port authority or district or otherwise, making provision for such taxation.

The cases of Patrick Gardens, Inc. and Patrick Village, Inc. v. Nash, involve leasehold interests under §§1270, et seq., title 10, of the U. S. code, and the right of the counties to levy ad valorem taxes against such leasehold interests, which case was presented to the supreme court, prior to the denial of the rehearing in the Park-N-Shop, Inc. case, but which cases have not yet been decided. Unless these cases may be distinguished from the Park-N-Shop, Inc. case, we may well expect the same ruling in them that was made in the said Park-N-Shop, Inc. case.

Subject to any distinction that might be made between the Patrick Gardens, Inc. and Patrick Village, Inc. cases, and the Park-N-Shop, Inc. case, which might be applicable to leaseholds from public bodies other than the county, each of the above cases is answered in the negative, and taxes heretofore assessed appear to be invalid. As to leases within the purview of the Park-N-Shop, Inc. opinion (leases from counties), it appears that the taxing authorities may make a notation on the assessments indicating that they are invalid under the Park-N-Shop, Inc. opinion. It may be that the opinion or judgments in the Patrick Gardens, Inc. and Patrick Village, Inc. cases should be awaited before cancelling those leasehold assessments embraced under the 2nd question; however, no effort should be made to collect the taxes thereon until after the said pending cases are decided.

058-60—February 20, 1958

INSURANCE

PREMIUM FINANCING—ASSIGNMENT, RIGHTS OF BANK AND INSURANCE AGENCY

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

STATEMENT OF FACTS:

A number of banks in Florida are engaged in premium financing. The contracts take the form of a negotiable installment promissory note, payable to the bank, in which the debtor-policyholder assigns as collateral security all moneys which may become due or payable under the insurance policy including moneys payable for losses insured against. The bank notifies the insurer of the assignment and pays the premium. Many banks require the agency writing the policy to endorse the note.

QUESTIONS:

1. Would the bank's lack of an insurable interest in the property insured affect its rights under the assignment?
2. If the agency is called upon to pay the note, would it be subrogated to the bank's rights under said assignment?

Even though the assignee has no insurable interest in the property insured it seems to be well settled that a policy of insurance is a species of property which may be pledged as collateral security for a debt and that such a pledge will be valid and binding (see 29 Am. Jur., Vol. 29, Insurance, §496). This applies both to life insurance policies (Appleman, Insurance Law and Practice, §1311) and to property insurance policies (Appleman, Insurance Law and Practice, §3452). There appears to be no case in Florida directly in point; however, cases so holding in most other jurisdictions are cited in 31 A. L. R. 2nd, at p. 1199, et seq. Even where there is a provision in the insurance policy forbidding assignment under penalty of forfeiture, assignment merely as collateral security has been held to be effective (see Appleman, Insurance Law and Practice, §3452). Notice to the insurer of the assignment and acquiescence therein by the insurer would eliminate any question as to the validity of the assignment. Your 1st question is answered in the negative.

An insurance agency, as any other person, may not unilaterally effect a private set-off of mutual debts. It is the accepted rule that an agency may not withhold loss drafts until the policyholder pays its debts to the agency. However, if an agency, as co-signer of the note, is called upon by the bank to pay said note, by the familiar rules of suretyship, the agency would become subrogated to the bank's rights against the collateral security. These rights would include a lien against moneys payable to the policyholder under the pledged policy to the extent of the amount paid by the agency on the note. Your 2nd question is answered in the affirmative.

058-61—February 21, 1958

PUBLIC LANDS AND PROPERTY

**BUILDINGS—REQUIREMENT FOR COMPETITIVE BIDS—
CH. 255, F. S.**

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Do the provisions of Ch. 255, F. S., require that every officer, board, department or commission charged with a duty of preparing specifications or awarding or entering into contracts for alteration, erection or construction of state buildings, let said contracts on competitive bids when the contract amount is in excess of \$10,000?

For the purpose of this opinion, be it understood that the comments herein made refer only to contracts for work to be done in connection with buildings of the state, as distinguished from buildings of political subdivisions of the state, such as county or municipal buildings. These items are the subject matter of other statutory provisions.

Your attention is invited to §125.08, F. S., which requires that certain contracts shall be let by the board of county commissioners upon competitive bidding. Many of the municipalities also have similar requirements in their enabling acts. The above cited statutory provision and the requirement of municipal charters are obviously inapplicable to contracts entered into by the state.

As to the Preparing of Specifications:

For work of the nature contemplated by your inquiry, there is no requirement that specifications for such contracts be prepared in any particular manner. Section 255.041, F. S., does permit officers, boards, departments or commissions having a duty of preparing specifications to prepare separate specifications of several component parts of state buildings, namely: (1) heating, ventilation and accessories; (2) plumbing and gas fittings and accessories; (3) electrical installations; (4) air conditioning, for the purpose of comfort, cooling by the lowering of temperature and accessories.

The specifications for these particular component parts of state buildings may be so prepared as to be the subject matter of bids separate and apart from the overall construction and/or alteration bid. This provision is permissive rather than mandatory, and is a matter to be determined purely by exercise of discretion by the officer, board, agency or commissions charged with the duty of preparing state building contract specifications.

As to Competitive Bidding:

The authorities seem to agree that requirement for competitive bidding, in connection with contracts for public works in the absence of some constitutional or statutory provision, municipal ordinance, or other legislative requirement, is not an essential prerequisite to the validity of contracts for public work, contract to furnish materials to public bodies or other contracts by and with public bodies.

Experience has shown, however, that the interest of the public are best conserved by offering contracts for public works to the competition of all persons able and willing to perform them (43 Am. Jur., Public Works and Contracts, §24).

The state, acting through its officers, agencies, boards and commissions has, by their conduct, given recognition to a public policy of awarding contracts for erection, construction or alteration of state buildings only on competitive bids. For example, the board of commissioners of state institutions, which is charged with the erection, maintenance of many of the state buildings has for many, many years awarded contracts for work in connection with these buildings only on competitive bids. This policy has also been adhered to by the board of control in connection with contracts for work to be done on those state buildings within its jurisdiction.

It is my opinion that, although there is no expressed requirement that contracts for the erection, construction or alteration of state buildings be let on competitive bids, the public interest in such matters requires that continued recognition of this extremely strong public policy be maintained for the common good. This fundamental policy is so firmly a part of the operation of the state, that unless some extreme emergency or unusual circumstance exists, whereby the best interest of the state will not be served by adherence thereto, this policy must be maintained.

That portion of the question propounded, which relates to whether or not the award of contracts for alteration, erection or construction of state buildings is required to be based on competitive bid, is answered in the affirmative.

058-62—February 20, 1958

Reconsideration of AGO 056-353.

TAXATION

CLASS "C" INTANGIBLE PERSONAL PROPERTY TAXES—
AGREEMENT BY REMAINDERMAN TO SUBORDINATE
FEE TITLE TO MORTGAGE ENCUMBERING LONG
TERM LEASE—§§199.02 AND 697.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are agreements by remaindermen subordinating their remainderman's fee title to the lien of mortgages encumbering long time term leases of real property mortgages upon real property in this state subject to taxation under chapter 199, F. S., as class "C" intangible personal property?

We have carefully reconsidered our opinion 056-353, of Dec. 21, 1956, concerning agreements subordinating a remainderman's fee title to a mortgage encumbering a long term lease and the status of such agreements as mortgages encumbering real property in this state within the purview of §199.02(3), F. S., and deem it advisable that the question be restated and reconsidered. The question is now restated above and the opinion revised and re-drafted as follows:

To illustrate the lessee under a long term lease of real property in this state encumbers such lease by mortgage to secure an indebtedness. At the time of the execution of the said mortgage, or subsequent thereto, the remainderman or owner of the fee title subject to the said lease executes an agreement subordinating his title to the mortgage of the said lease for a term. The subordination

agreement expressly subordinates the remainderman's "*right, title and interest in and to the foregoing lease agreement to the lien and operation of . . . the mortgage*" and further agrees to "subordinate the fee simple title of the lessor (fee owner) to the . . . mortgage" encumbering the leasehold interest. It is expressly stipulated in the subordination agreement that the fee owner or remainderman incurs no obligation to pay the mortgage indebtedness.

In this state "all conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose of or with the intention of securing the payment of money . . . shall be deemed and held mortgages . . ." (§697.01, F. S.). In this state "the mortgage debt is the essential fact and the mortgage itself a mere incident of it (*Younghusband v. Fort Pierce Bank and Trust Co.*, 100 Fla. 1088, 130 So. 725, text 728, citing *Scott v. Taylor*, 63 Fla. 612, 58 So. 30 and *Voorhis v. Crutcher*, 98 Fla. 259, 123 So. 742). Under said §697.01, F. S., the intention of the party making the instrument seems material; without regard to the form of the instrument if it appears to have been the intention of the party creating such instrument to secure the payment of an indebtedness then the instrument would seem to be a mortgage, if there was no such intention then there would seem to be no mortgage. "The essential feature or essence of an equitable mortgage is the intent of the parties to create a mortgage, lien or charge on the property sufficiently described or identified to secure an obligation" (59 C. J. S. 43, §13). An equitable mortgage arises from a transaction, regardless of its form, which resolves into a security, or an attempt or offer to pledge property as security for a debt or liability (59 C. J. S. 42, §13; *Holmes v. Dunning*, 101 Fla. 55, 133 So. 557; *Longdon v. Wakeley*, 62 Fla. 530, 56 So. 408; *Margarum v. J. J. Christie Orange Co.*, 37 Fla. 165, 19 So. 637). Whether or not an agreement subordinating a remainderman's fee title to the lien of a mortgage encumbering a leasehold interest in the property is or is not to be deemed a mortgage depends primarily upon the intention of the parties to the subordination agreement.

Remainders and reversions may be mortgaged to secure the payment of indebtednesses (59 C. J. S. 237, §183; 31 C. J. S. 107 and 108, §90). The estate of a lessor of real property, during the term of the lease, is limited to his reversionary interest, which ripens into perfect title at the expiration of the lease (*Gray v. Callahan*, 143 Fla. 673, 197 So. 396, text 398; 51 C. J. S. 893, §256) together with his ground rents and rental reserved during the term of the lease (*Wagner v. Schremba*, 44 Ohio App. 44, 184 N. E. 292). Where a person subordinates his title or interest in real property to that of another he may be said to have placed it "in a lower order, class or rank" so that it occupies "a lower position in a regular descending series" makes it inferior "in order, nature, dignity, power, importance or the like," so that it belongs "to an inferior order in classification," has "a lower position in a recognized scale," is "secondary or minor" (*Re Fidelity Union Title and Mortgage Guaranty Co.*, N. J. Eq., 177 A. 449, text 452; *Encyclopaedic and Standard Dictionaries*). We find no authority or authorities holding that the giving of a subordination agreement, by the lessor of real property, subor-

dinating the lessor's reversion or fee title to the lien of a mortgage encumbering only a leasehold interest in such real property, amounts to a lien or mortgage encumbering such reversion or fee title, *unless* there is apparent, in the subordination agreement or otherwise, an intention to encumber the said real property to secure the payment of the indebtedness also secured by the mortgage on the leasehold interest. The question is largely one of intention to be gleaned from all applicable facts and circumstances.

This leads us to the conclusion that agreements by remaindermen and fee title owners subordinating their remainders or fee title to mortgages encumbering leasehold interests in such real estate may or may not constitute real estate mortgages depending upon the purposes and intention of such subordination agreements. Normally we doubt that such subordination agreements constitute mortgages; however, the intention of the parties is the controlling factor and where the purpose and intention of such an agreement is to secure the payment of an indebtedness then under the Florida Statutes and in equity there is a mortgage. This being true we do not think that clerks of the circuit court should refuse to accept payment of class "C" intangible personal property taxes on such instruments when tendered. Such a tender of class "C" intangible personal property taxes would seem to be a construction by the party offering the instrument for record that it was a real estate mortgage, although the other party may not be bound by this construction by the party making it.

The above observations seem to answer the above stated question as well as the same may here be answered. Opinion 056-353, of Dec. 21, 1956, is hereby overruled in so far as it may be in conflict herewith.

058-63—February 20, 1958

CRIMINAL PROCEDURE

BAIL BOND, ESTREAT BY JUSTICE OF PEACE COURT,
WHERE INFORMATION MAKING SIMILAR CHARGE
SUBSEQUENTLY FILED AGAINST SAME DEFENDANT
AND COPIES ISSUED BY CRIMINAL COURT OF
RECORD

To: *W. Marion Hendry, Justice of the Peace, Tampa*

QUESTIONS:

1. Where a defendant, upon his arrest under a felony warrant issued by a justice of the peace, makes bond to appear before said justice of the peace on a day certain, and where, after the making of said bond but before the date it requires the defendant to appear, the county solicitor files informations against said defendant in the criminal court of record, one charging the same felony charged in the complaint made before the justice of the peace and the others charging like felonies allegedly committed on other dates, and where a *capias* is issued under each of said informations but the defendant is not arrested thereunder because of his flight from the jurisdiction, and where the defendant fails to

appear before the justice of the peace on the day his appearance is required by said bond, does the justice of the peace have the right to estreat said bond despite the filing of said informations and the issuance of a capias under each of them?

2. Under the facts recited in question 1, *supra*, does the justice of the peace have jurisdiction in the case pending before him despite the filing of the informations and the issuance of a capias under each of them?

It is necessary to consider only the effect of the filing of the information charging the offense which is also the basis for the felony warrant issued by the justice of the peace and the issuance of a capias under said information, since the filing of an information charging another offense on another date, and the issuance of a capias thereunder which is not served, could under no circumstances affect the rights and jurisdiction of the justice of the peace in the case pending before him.

As a general rule no preliminary examination is necessary after the defendant has been indicted or informed against for the crime with which he stands charged before the committing magistrate, (22 C. J. S. 486, Criminal Law, §332-b). However, after stating this legal principle, Corpus Juris Secundum makes the following statement on the same page of the same volume, to-wit:

Finding of indictment pending examination. Where accused is under arrest on a warrant based on an information filed with a justice of the peace, he cannot by the finding of an indictment be deprived of his right to have the examination then pending completed by the examining magistrate.

If, as stated in the foregoing quotation, the finding of an indictment does not deprive a defendant of his right to have a pending preliminary examination completed by the examining magistrate, it necessarily follows that the finding of an indictment or the filing of an information does not deprive the examining magistrate of jurisdiction over the case pending before him and therefore does not cut off his right to forfeit a bail bond posted by the defendant when the defendant fails to appear in accordance with the condition of such bail bond.

I also find that 22 C. J. S. 187, Criminal Law, §111-a, lays down the following principle of law:

When jurisdiction acquired. The jurisdiction of one court does not attach, so as to exclude the jurisdiction of another, until jurisdiction of the person has been obtained, and the mere finding of an indictment by one court does not give it exclusive jurisdiction prior to the arrest of accused thereunder.

Even if the first pronouncement quoted above should be thought to be erroneous or inapplicable to the situation at hand, I think that reason and logic would require the application of the last quoted pronouncement and would require the holding that the mere filing of an information in the criminal court of record, charging the same felony as was charged before the justice of the peace, and the consequent issuance of a capias

under said information, without any arrest being made under such *capias*, does not deprive the justice of the peace of his jurisdiction and does not do away with his right and authority to forfeit the defendant's bail bond upon his failure to appear in accordance with its condition.

It is true that said last quoted pronouncement was made in connection with a discussion of the legal proposition that generally, where several courts have concurrent jurisdiction of the same offense, the court first acquiring jurisdiction of the prosecution retains it to the exclusion of the others. It is also true that the justice of the peace and the criminal court of record do not have concurrent jurisdiction over a felony case, since the former cannot try such a case but the latter can and since the functions to be performed by them are different; and that the pendency of a felony charge before a justice of the peace does not deprive the county solicitor of the authority and power to file an information in the criminal court of record. However, despite these considerations, I am of the opinion that the doctrine of said last quoted pronouncement is quite applicable here.

Any other conclusion would appear to lead to an absurd result and would enable the defendant to play both ends against the middle. On the one hand, it would permit him to flee and avoid appearing before either the justice of the peace or the criminal court of record. On the other hand, it would enable him and his sureties to escape liability on the bail bond given for his appearance in the justice of the peace court upon the theory that the criminal court of record had assumed jurisdiction, even though it is apparent that said court's jurisdiction was incomplete in that it did not have jurisdiction over his person and was therefore powerless to try him.

The bail bond given by the defendant mandatorily required his appearance before the justice of the peace at a stated time. In my opinion, that requirement was not dispensed with by the mere filing of the information in the criminal court of record and the issuance of a *capias* thereunder.

Therefore, it is my opinion that your said questions are properly answered in the affirmative.

058-64—February 21, 1958

CRIMINAL PROCEDURE

POWER OF PROSECUTING ATTORNEY TO NOLLE PROSEQUI A CASE PENDING IN COUNTY JUDGE'S COURT

To: *W. F. Anderson, County Judge, Bronson*

QUESTION:

Where there is no statutory provision authorizing a county prosecuting attorney to have witnesses subpoenaed before him, and where the county judge has issued a warrant after he has talked with the witnesses and has determined that there is sufficient evidence to justify the issuance of such warrant, does the county prosecuting attorney have the authority to nolle prosequi the case?

I find no Florida statute which specifies by whom a nolle prosequi can be entered or under what circumstances it may be entered. Therefore, the common law governs. At common law,

only the attorney general could exercise the power to enter a nolle prosequi and, except where the authority is transferred elsewhere by statute, this power is still reposed in the attorney general or in the several public prosecutors. At common law, and under the general rule prevailing in the absence of statute, the matter of entering a nolle prosequi rests entirely within the discretion of the prosecuting officer, without leave of court, in all stages of a criminal prosecution before the jury is empaneled. (See *Wilson v. Renfroe*, 91 So. 2d 857; 22 C. J. S. 706-707, Criminal Law, §457, (a) and (c); and 14 Am. Jur. 967, Criminal Law, §296).

In Florida the powers and duties performed by the attorney general at common law with regard to the handling and prosecution of criminal cases have largely become vested in the local prosecuting attorneys and I am of the opinion that a prosecuting attorney now has the same authority to nolle prosequi a case that the attorney general had at common law.

It is therefore my opinion that your question is properly answered in the affirmative; that the county prosecuting attorney has the right to nolle prosequi a case pending in a county judge's court despite the fact that he has no authority to have witnesses subpoenaed before him and despite the fact that the county judge has talked to the witnesses and is of the opinion that the evidence is sufficient to justify the prosecution of the case; and that the prosecuting attorney may exercise this authority without leave of court.

058-65—February 21, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT—SOUTH PENINSULAR ZONING DISTRICT—
CH. 122, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the officers and employees of the south peninsular zoning district, in Volusia county, within the purview of Ch. 122, F. S., and required to be members of the state and county officers and employees retirement system?

This district was established by Ch. 26475, 1949, and embraces a certain described area in Volusia county (§1, Ch. 26475). "For the purpose of promoting health, safety, morals or the general welfare of the people of the said district, the Board of County Commissioners of Volusia county, Florida, is hereby empowered within said district to regulate and restrict the height, number of stories, and size of buildings and other structures on land and water, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the use of buildings, structures and land for trade, industry and residence or other specific use; to adopt a building code and other matters proper to be regulated to safeguard the safety, health and welfare of the people of the district . . ." (§2, Ch. 26475). A reading of the said act clearly indicates an intention of zoning a district for the benefit of the district itself, although there may be an indirect benefit to another or other areas of the county. The district does not

appear to be an agency of the county, but an independent agency to control zoning in the limited area of the district.

Although the board of county commissioners appears to have been ex officio the district board until the adoption of Ch. 31338, 1955, said 1955 act established an independent board, the zoning commission of the said district, and divested the board of county commissioners of any further control over the said district. The powers of the board of county commissioners to appoint patrolmen for the district, under Ch. 27955, 1951, appear to have been transferred to the district board under said Ch. 31338. This brings us to a determination of whether the officers and employees of the said zoning district are within the purview of and under Ch. 122, F. S.

State and county officers and employees, within the purview of said Ch. 122, F. S., "include all full time officers or employees who receive compensation for services rendered from state or county funds, or from funds of drainage districts or mosquito control districts of a county or counties . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for services rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not . . ." (§122.02 (1), F. S.). (Emphasis supplied.) The circuit court (Judge Taylor) in a proceeding, brought prior to the adoption of §122.061, F. S., at the 1957 session of the legislature, held hospital districts *not within* the purview of Ch. 122, F. S., or of the definition contained in §122.02 (1), F. S.

"'County' is more specific and less elastic than 'district' which may be employed to designate an area greater or less than a county, and is not synonymous therewith, except as employed in some constitutional or statutory provision . . ." (20 C. J. S. 756, §1). Although districts (such as county commissioners, justice of the peace, etc.) may have reference to divisions of the counties, they may also refer to separate entities, such as drainage districts, hospital districts, etc. Note must be taken of the specific mention in said §122.02(1), F. S., of drainage districts and mosquito control districts as being within the definition of state and county officers and employees, without any specific mention of zoning and other type districts.

These observations lead to a negative answer to the above stated question and a holding that zoning districts are not within the purview of Ch. 122, F. S., unless made, by the statutes setting them up, divisions of the county instead of separate entities.

058-66—February 21, 1958

ELECTORS AND ELECTIONS

COMPENSATION FOR DEPUTY SHERIFFS SERVING AT
ELECTION PRECINCTS—§§102.021, 102.081, 30.49
AND 30.50 F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Should deputy sheriffs serving at election precincts
as provided by §102.081, F. S., be paid by the board of

county commissioners as provided by §102.021, F. S., or by the sheriff as provided by §§3 and 4 of Ch. 57-368?

The question involved here is essentially one of statutory construction. Section 102.081, F. S., provides:

Deputy sheriff at each polling place.—The sheriff shall deputize a deputy sheriff for each precinct who must be present during the time the polls are open and until the election is completed, who shall be subject to all lawful commands of the inspectors, and who shall maintain good order. The deputy may summon a posse from among bystanders to aid him when necessary to maintain peace and order at the polls.

Section 102.021, F. S., provides:

Compensation of inspectors and clerks.—Inspectors and clerk of any election and the deputy sheriff serving at the precincts shall be paid for their services by their respective boards of county commissioners, and the inspectors who deliver the returns to the county seat shall receive such sum as the board of county commissioners shall determine but in no event shall the sum exceed one dollar per hour and seven and one-half cents per mile each way while performing such services. (Emphasis supplied.)

It is to be noted that both of the above quoted sections were enacted in 1951 as part of the election code.

It is a general rule of law that statutes are not to be repealed by implication (*Parker v. City of Jacksonville, Fla.*, 182 So. 2d 131). In order for a court to declare that one statute impliedly repeals another, it must appear that there is a positive repugnancy between the two or that the last was clearly intended to prescribe the only governing rule or that it revises the subject matter of the former (*Tamiami Trails v. City of Tampa*, 159 Fla., 287, 31 So. 2d 468). Inconsistency does not constitute positive repugnancy and there is no showing that the later act was intended to prescribe the only governing rule. Chapter 102, F. S., is part of several chapters devoted specially to matters concerning elections. On the other hand Ch. 57-368 was enacted for the sole purpose of setting up a method for compensating sheriffs. No rule of statutory construction permits implied repeal of one special act by a later special act on a different subject.

Considering the practical aspect of the issue it appears that there might be several special elections during a year which might not be foreseeable at the time the sheriff's budgets were submitted. This could possibly cause considerable extra work and grief resulting from requests to amend said budgets to include the salaries of extra special deputies who are not regular members of the sheriff's department. The county commissioners have a more flexible budget than do the sheriffs and are, therefore, in a better position to provide the compensation for the additional deputies under the provisions of §102.021, F. S. Practical application can be a determining factor in statutory construction (*Latham v. Hawkins*, 121 Fla., 324, 163 So. 709).

Although Ch. 57-368 was enacted subsequent to the election code and provides therein for the payment of deputies (Ch. 57-368, §3 (2) (b)) this later act is not considered as an amend-

appear to be an agency of the county, but an independent agency to control zoning in the limited area of the district.

Although the board of county commissioners appears to have been ex officio the district board until the adoption of Ch. 31338, 1955, said 1955 act established an independent board, the zoning commission of the said district, and divested the board of county commissioners of any further control over the said district. The powers of the board of county commissioners to appoint patrolmen for the district, under Ch. 27955, 1951, appear to have been transferred to the district board under said Ch. 31338. This brings us to a determination of whether the officers and employees of the said zoning district are within the purview of and under Ch. 122, F. S.

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"County" is more specific and less elastic than 'district' which may be employed to designate an area greater or less than a county, and is not synonymous therewith, except as employed in some constitutional or statutory provision . . ." (20 C. J. S. 756, §1). Although districts (such as county commissioners, justice of the peace, etc.) may have reference to divisions of the counties, they may also refer to separate entities, such as drainage districts, hospital districts, etc. Note must be taken of the specific mention in said §122.02(1), F. S., of drainage districts and mosquito control districts as being within the definition of state and county officers and employees, without any specific mention of zoning and other type districts.

These observations lead to a negative answer to the above stated question and a holding that zoning districts are not within the purview of Ch. 122, F. S., unless made, by the statutes setting them up, divisions of the county instead of separate entities.

058-66—February 21, 1958

ELECTORS AND ELECTIONS

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ELECTION PRECINCTS—§§102.021, 102.081, 30.49
AND 30.50 F. S.

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as provided by §102.081, F. S., be paid by the board of

county commissioners as provided by §102.021, F. S., or by the sheriff as provided by §§3 and 4 of Ch. 57-368?

The question involved here is essentially one of statutory construction. Section 102.081, F. S., provides:

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It is to be noted that both of the above quoted sections were enacted in 1951 as part of the election code.

It is a general rule of law that statutes are not to be repealed by implication (*Parker v. City of Jacksonville, Fla.*, 182 So. 2d 131). In order for a court to declare that one statute impliedly repeals another, it must appear that there is a positive repugnancy between the two or that the last was clearly intended to prescribe the only governing rule or that it revises the subject matter of the former (*Tamiami Trails v. City of Tampa*, 159 Fla., 287, 31 So. 2d 468). Inconsistency does not constitute positive repugnancy and there is no showing that the later act was intended to prescribe the only governing rule. Chapter 102, F. S., is part of several chapters devoted specially to matters concerning elections. On the other hand Ch. 57-368 was enacted for the sole purpose of setting up a method for compensating sheriffs. No rule of statutory construction permits implied repeal of one special act by a later special act on a different subject.

Considering the practical aspect of the issue it appears that there might be several special elections during a year which might not be foreseeable at the time the sheriff's budgets were submitted. This could possibly cause considerable extra work and grief resulting from requests to amend said budgets to include the salaries of extra special deputies who are not regular members of the sheriff's department. The county commissioners have a more flexible budget than do the sheriffs and are, therefore, in a better position to provide the compensation for the additional deputies under the provisions of §102.021, F. S. Practical application can be a determining factor in statutory construction (*Latham v. Hawkins*, 121 Fla., 324, 163 So. 709).

Although Ch. 57-368 was enacted subsequent to the election code and provides therein for the payment of deputies (Ch. 57-368, §3 (2) (b)) this later act is not considered as an amend-

ment to nor repeal of §102.021, F. S. Chapter 102, on the other hand, pertains specifically and specially to conducting elections and §102.021 provides specifically for the payment of deputies for services rendered at election precincts. Therefore, it is my opinion that deputy sheriffs serving at elections under the provisions of §102.081, F. S., should be paid by the board of county commissioners as provided for in §102.021, F. S.

058-68—February 21, 1958

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—JOINT AD-

VENTURE AND PARTNERSHIPS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION

Is the interest of a joint adventurer in a joint adventure an interest in a separate entity, similar to the interest of a partner in a partnership, for the purposes of intangible personal property taxation?

This office on June 6, 1957 (057-148) held that the interest of a partner in a partnership was intangible personal property. Such interest has been said to be a chose in action which may be sold, assigned or mortgaged and may be seized under process. The personal property of a partnership is owned not by the partners individually but by the partnership.

The relationship of a joint adventure "is quite similar to that of a partnership and is governed by the principles which constitute and control the law of partnership The principal difference between a partnership and a joint adventure is that the joint adventure is usually limited to a single enterprise" (Russell v. Thielen, Fla., 82 So. 2d 143). A "joint adventure" is an agreement among two or more persons to purchase specific property for speculation or resale at a profit, the distinction between such an agreement and one of partnership being the limited and specific object in view (Donahue v. Davis, Fla., 68 So. 2d 163). "Joint adventurers take title to real estate purchased by them as tenants in common and not as partners" (48 C. J. S. 834, §7). "Property purchased with the funds of the joint adventure, or with profits derived therefrom, belong, unless otherwise agreed, to all the coadventurers in equal proportion Even though title is permitted to be taken in the name of one of the coadventurers, the right of the others is not impaired thereby, for under such circumstances the one holding title becomes trustee for all" (30 Am. Jur. 692, §29).

From the above and foregoing authorities it appears that title to property held under a joint adventure is vested in the joint adventurers themselves and not in any separate entity as in the case of a partnership. The interest of the joint adventurers is in the property itself and not in any separate entity, as is the case of partners in a partnership.

The above stated question is answered in the negative.

058-69—February 24, 1958

HIGHWAY CODE

NO-PARKING SIGNS ON RIGHT-OF-WAY OF A STATE HIGHWAY—§§317.01(12), 317.05, 317.44(1), (3) (a), (b), 321.05 AND 146.04, F. S.

To: *Glen Darty, Assistant Solicitor, Bartow*

QUESTIONS:

1. May the state road department place no-parking signs on the right-of-way of a state highway outside a municipality?

2. Is a no-parking sign a "traffic-control device" as contemplated in §317.05, F. S.?

3. If no-parking signs are placed on a right-of-way of a state highway outside a municipality, may the state highway patrol and/or the Polk county highway patrol remove vehicles parked in violation of said signs as provided in §317.44(3)(a), and (b), F. S.?

AS TO QUESTION 1:

Chapter 317, F. S., is intended to provide a formula for the regulation of traffic on highways. The fundamental purpose involved in the enactment of this statute by the legislature is the safe movement of persons on the highway system of our state. In keeping with this principle, §317.44(1) requires that vehicles shall not stop or park upon the traveled portion of the highway, but whenever possible shall be stopped, parked or left off the traveled portion of the highway. This requirement seems to negate any authority of the state road department to prohibit parking on the portion of the roadway adjacent to the paved main highway outside a municipality, unless such parking will endanger traffic moving over the highway.

In keeping with the fundamental principle of the safety of vehicular traffic moving on the highways, the state road department, after conducting a thorough traffic investigation and making a determination that the public safety requires the erection of a no-parking sign in an area where such regulation is requested, with a determination of the necessity of such sign duly reflected in its minutes, is authorized to erect such a no-parking sign. Possibly subjects for such special regulations might be cloverleaf interchanges on express highways, congested areas just outside city limits, such as shopping centers and freeways.

Subject to this qualification, question 1 is answered in the affirmative.

AS TO QUESTION 2:

Section 317.01(12) defines an official traffic-control device as "all signs, signals, markings and devices not inconsistent with this chapter, placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic." It is my opinion that under this statutory definition, a no-parking sign is a traffic-control device as contemplated by §317.05, F. S.

Question 2 is answered in the affirmative.

AS TO QUESTION 3:

While Section 317.44(3)(a) and (b), F. S., authorizes the

removal of vehicles from the main traveled portion of the highway only, your attention is invited to §321.05, F. S., dealing with the duties, functions and powers of Florida highway patrol officers. The authority conferred upon the patrol officers by subsection (1) of this section appears to be sufficiently broad to permit the removal of vehicles by the Florida highway patrol officers parked in violation of a no-parking sign erected in accordance with the procedure as appears in connection with question 1 of this opinion.

Section 146.04, F. S., requires county traffic patrol officers to enforce the traffic laws and regulations. Under this section said officers are authorized to arrest persons committing violations of the laws of Florida in their presence. This requirement and authorization appears to be sufficiently broad to permit county highway patrol officers to remove vehicles parked in violation of no-parking signs which have been erected in accordance with the procedure outlined by the answer to question 1 of this opinion.

Question 3 is answered in the affirmative.

058-70—February 27, 1958

STATE OFFICERS AND EMPLOYEES

RETIREMENT—CIRCUIT JUDGES—CHS. 38 AND 123; §§123.03, 123.04, 123.06, 123.12, 123.13 AND 38.14, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Under §§123.12 and 123.13, F. S., certain rights acquired under Ch. 38, F. S., are preserved to circuit judges. Where such judge has completed 10 years of service, is he eligible to retire under Ch. 123, or must he complete the 12 years required for retirement under said Ch. 38?

Retirement of circuit judges is recognized by §§2 and 17, Art. V, of the state constitution. Circuit judges who elected to come under the provisions of Ch. 123, F. S., who have attained the age of 65 years, and who have served as such judge "for at least ten years in the aggregate, or had ten years of otherwise creditable service either before or after the passage of this law . . . may resign or retire with the right to be paid, and shall be paid on his own requisition in equal monthly installments during the remainder of his natural life . . . retirement compensation in accordance with the table of benefits provided . . ." (§123.04, F. S.). Section 123.06, F. S., provides the regular retirement benefits under said Ch. 123; however, §123.13, F. S., provides that "a . . . circuit judge who becomes eligible for retirement in accordance with the provisions of this chapter, and who had theretofore accepted or elected to accept the provisions of . . . section 38.14, shall be entitled to receive and shall upon retirement receive as retirement compensation to be paid during the remainder of his natural life two-thirds of the total salary being paid to such . . . judge at the time of his retirement, or at his option the retirement compensation provided under the terms of this chapter." (Emphasis supplied.)

Although §123.12, F. S., preserves the rights which may have been acquired by any circuit judge under any retirement law (including Ch. 38, F. S.), it recognizes the right of such

judges to waive or renounce such rights and subordinate them in favor of the provisions of Ch. 123, F. S. Here we seem to be dealing with a case where the rights under Ch. 38, F. S., have been subordinated by transfer, pursuant to §123.03, F. S., to said Ch. 123. The circuit judge in question will in time become "eligible for retirement in accordance with the provisions of" Ch. 123; further, he heretofore "accepted or elected to accept the provisions of . . . section 38.14," so that he "shall be entitled to receive and shall upon retirement receive as retirement compensation to be paid during the remainder of his natural life two-thirds of the total salary being paid to such . . . judge at the time of his retirement . . ." (§123.13, F. S.).

This brings us to the question of when a judge under Ch. 123, F. S., is eligible for retirement. Under §123.04, F. S., any circuit judge "who has attained the age of sixty years, and has served as a . . . circuit judge for *at least ten years*, or had ten years of otherwise creditable service . . . may resign or retire with *the right to be paid . . . retirement compensation in accordance with the table of benefits provided in this section or as provided in section 123.13.*" (Emphasis supplied.)

From the above and foregoing, it appears that where a circuit judge, previously under §38.14, F. S., elects to come under Ch. 123, he may retire under the terms of said Ch. 123 without completing the 12 years of service required under said §§38.14, et seq., F. S., so long as he meets the requirements of Ch. 123. This answers the above stated question.

058-71—February 27, 1958

TAXATION

PROPERTY LEASED FOR A TERM OF YEARS TO MUNICIPALITY—EXEMPTION—§§183.14, 192.06 AND 193.40, F. S.;
§1, ART. IX, AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where real property is leased to a municipal corporation, for a term of years to be used as a municipal parking lot, is the fee title or remainder to the said property subject to taxation?

The parcel of land in question was leased by the municipality from a resident of the municipality for a term of years to be used as a municipal public parking lot. The lease has been duly recorded in the office of the clerk of the circuit court. The parking lot appears to have been established and now exists under and pursuant to Ch. 183, F. S. "Parking facilities constructed under the provisions of this chapter constitute public property and are used for municipal purposes, no municipality shall be required to pay any taxes or assessments upon any such parking facilities or any part thereof . . ." (§183.14, F. S.).

Under §1, Art. IX, and §16, Art. XVI, State Const., real and personal property of persons, firms and corporations are subject to ad valorem taxation, unless such property is *held and used exclusively* for religious, scientific, *municipal*, educational, literary or charitable purposes" (see also §192.06, F. S.) "Assuming that section 1, article IX, and section 16, article XVI, of the constitution con-

template or permit property of a private corporation to be exempted from state and county taxation when the property is leased to a municipality to be used for its duly authorized municipal purposes . . . in case of such a lease the property will be subject to authorized state and county ad valorem taxation, at least unless it be affirmatively and definitely shown that the entire property, or a severable portion thereof, sought to be exempted from such taxation is in fact being held and used by the city exclusively for municipal purposes that are duly authorized by law. To be exempted from taxation the property of a private corporation so leased to a municipality for its authorized purposes must be used exclusively for one of the purposes stated in section 16, article XVI, of the constitution, and *not merely used in whole or in part for other public purposes* distinct from those specifically enumerated in the stated organic section." (St. Augustine v. Middleton, 147 Fla. 529, 3 So. 2d 153, text 156-7). (Emphasis supplied.) In *Riverside Military Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870, property used for school purposes was taken under eminent domain for a term of years by the U. S., and it was held that the property being used for a governmental purpose was not subject to taxation during the term for which taken by the U. S. The organic provisions for tax exemption appear to be controlling (*State v. St. John*, 143 Fla. 876, 197 So. 549).

This brings us to the question of whether the use of real property for public parking purposes is a municipal purpose or use within the purview of §1, Art. IX, and §16, Art. XVI, State Const. These organic provisions do not exempt municipal property as such from taxation, but property that is held and used exclusively by them for municipal purposes (*State v. St. John*, 143 Fla. 544, 876, 197 So. 131, 549). "The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental, but that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality . . . in previous decisions we have approved airports, golf courses, school buildings, and other structures as proper for a city to undertake." (*State v. McDavid*, 145 Fla. 605, 133 A. L. R. 360, 200 So. 100, text 102). These constitutional provisions do not exempt the corporate business or proprietary activities of municipalities from taxation (*State v. St. John*, supra; *Lakeland v. Amos*, 106 Fla. 873, 143 So. 744). If a municipal parking lot is corporate business, then it would seem to be exempt from taxation, but if a proprietary business of the municipality, then it would seem to be taxable.

Under §183.14, F. S., municipal parking facilities are declared to "constitute public property and are used for *municipal purposes*" and "no municipality shall be required to pay any taxes or assessments upon any such parking facility or any part thereof. . . ." (Emphasis supplied.) This declaration by the legislature appears to have been authorized (*Saunders v. Jacksonville*, 157 Fla. 240, 25 So. 648). Parking facilities established by a municipality to relieve crowded streets were held to be municipal purposes in *Miller v. Georgetown*, 301 Ky. 241, 191 S. W. 2d 403, text 405. We, therefore, hold that off street parking facilities established by municipalities for purposes of public safety and to relieve

traffic congestion on municipal streets, but not for purposes of gain or profit to the municipality, are municipal purposes within the purview of §1, Art. IX, and §16, Art. XVI, State Const., and entitled to exemption from ad valorem taxation. Such facilities established primarily for gain or profit would seem not to be for municipal, but for proprietary, purposes and not entitled to exemption from ad valorem taxation.

The question of the exemption of the fee title or remainder, where the parking facility is established on leasehold property, (see *St. Augustine v. Middleton*, supra, and *Riverside Military Academy v. Watkins*, supra), although the parking facility may serve a municipal purpose, merits some consideration. If the lease is for a long term, without right of immediate cancellation by the lessor or those claiming under him, then it would seem that the primary purpose would be for municipal purposes, and this would be especially so where the municipality has agreed to pay all taxes assessed. Here the primary use of the property, as well as its primary value, would be for parking facilities. Whether or not the primary use of the land is municipal or proprietary seems to be a question for decision by the tax assessor from all available information.

These observations seem to answer the above stated question as well as the same may be answered generally. The exempt status of such property can be determined only by the taxing officials from all available facts and circumstances. Exemption, where applicable, probably needs not be specifically claimed. Presuming that exemption was proper for the years mentioned in the clerk's letter, then the question of refunds of taxes paid comes up. Where the lands were exempt from taxation under the above rules, the payment of such taxes would seem to be a "payment when no tax was due," and within the purview of §193.40, F. S. The proceedings to be followed in making refunds are set out in our opinion of April 6, 1946 (046-132).

058-72—February 27, 1958

PUBLIC LANDS AND PROPERTY

BULKHEAD LINE—SALT WATER PROPERTY—INTERNAL
IMPROVEMENT FUND—§§253.12, 253.129-253.0013,
F. S. (CH. 57-362)

To: C. Ray Smith, County Attorney, St. Petersburg
QUESTION:

Does Ch. 57-362, exempt from its operation salt water rivers?

Section 1 of Ch. 57-362 reads in part:

Except submerged lands heretofore conveyed by deed or statute, and *submerged lands in navigable fresh water lakes, rivers and streams*, the title to all sovereignty tidal and submerged bottom lands, . . . is vested in the trustees of the internal improvement fund . . ." (emphasis supplied.)

I assume from your letter that since the act does not specifically say "fresh water rivers" and "fresh water streams," you interpret it to include all rivers and streams.

Section 253.12, F. S., as originally enacted included all lands

"located in the tidal waters of the counties in the State of Florida." As amended in 1951 the statute provided for all lands "except as to lands in Dade and Palm Beach Counties." The significant point in this section is, even as amended by Ch. 57-362, it has always included "tidal waters." Thus, within the framework of Ch. 57-362, its purpose is to regulate submerged lands in tidal waters.

There is no doubt, under the section as it existed prior to 1957, that rivers were included. These submerged lands were vested in the trustees of the internal improvement fund. The purpose of the bulkhead provisions of Ch. 57-362 is to set an exterior boundary beyond which no sales will be made and no fill operations permitted. This not only insures protection of the people's trust in navigable waters, but also prevents uneven, unattractive shorelines. The legislature recognized the need for providing bulkhead lines in salt water rivers and provided that navigable waters "shall include all coastal and intracoastal waters." To exclude salt water rivers and streams would make the *intracoastal* provision of the act meaningless for there would be no intracoastal waters left to regulate.

The intent of the legislature is further evidenced by other language of §253.12. The section, with two exceptions, vests *submerged lands* in the trustees of the internal improvement fund. These exceptions are: (1) "*Submerged lands* heretofore conveyed by deed or statute," and (2) "*Submerged lands* in navigable fresh water lakes, rivers and streams." (Emphasis supplied.) To exclude "fresh water" from "rivers and streams" you would also have to exclude "submerged lands." The act vests submerged lands, not waters. You must read "submerged lands in navigable fresh water" not only to modify lakes, but also rivers and streams; otherwise, the act will have a meaning which could not have been intended by the legislature. The exception is, therefore, only "fresh water lakes," "fresh water rivers" and "fresh water streams."

Your question is answered in the negative.

058-73—February 27, 1958

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

LIQUEFIED PETROLEUM GAS LAW—TRANSFER OF LICENSE TO VENDEE—§§526.12-526.20, 205.03, AND 215.26, F. S.

To: J. Edwin Larson, State Fire Marshal, Tallahassee

QUESTIONS:

1. Does the state fire marshal have authority to transfer a liquefied petroleum gas license issued under the provisions of §526.13, F. S., from the person, firm, corporation or partnership to whom the license was issued to a person purchasing the licensee's business?

2. Is the state fire marshal authorized to make a refund of the license fee paid by a licensee whose license was issued under the provisions of §526.13, when such licensee produces evidence that he has not engaged at all in the liquefied petroleum gas business as anticipated?

AS TO QUESTION 1:

Sections 526.12-526.20, F. S., which deal with liquefied petro-

leum gas licenses and regulatory matters pertaining thereto, contain no provision for the transfer of a liquefied petroleum gas license. In A. G. O. 047-342 (1947-48 Biennial Report, p. 259) this office held that a liquefied petroleum gas license was an occupational license in lieu of a license under Ch. 205, F. S., the general occupational license tax chapter. Section 205.03, F. S., provides in part as follows:

All business licenses may be transferred with the approval of the comptroller with the business for which they were taken out when there is a bona fide sale and transfer of the property used and employed in the business, but such transferred license shall not be held good for any longer time or any other place than that for which it was originally issued; . . .

It is my opinion that the state fire marshal is authorized to transfer a liquefied petroleum gas license to the purchaser of the licensee's business, provided that the purchaser has filed a bond in compliance with §526.14, F. S., and is otherwise qualified to hold a liquefied petroleum gas license.

AS TO QUESTION 2:

Section 215.26, F. S., provides for the repayment by the comptroller of funds paid into the state treasury through error. If the state fire marshal is convinced that the licensee has not engaged in the liquefied petroleum gas business in any way, it is my opinion that he may recommend to the comptroller that pursuant to §215.26, F. S., said comptroller make a refund of the license tax paid. The state fire marshal should, however, consider the limitation in §215.26(2), F. S., which provides that all applications for refunds shall be filed with the comptroller within one year after the right to such refund shall have accrued. This one-year limitation runs from the date the tax was erroneously paid.

Subject to the qualifications set forth above, both questions are answered in the affirmative.

058-74—February 27, 1958

MOTOR VEHICLES

DRIVERS' LICENSES—CONSTRUCTION OF §§322.27, 322.28 AND 324.131, F. S.—CHS. 322 AND 324, F. S.

To: *Richard E. Gerstein, State Attorney, Miami*

QUESTION:

Is §324.131, F. S., which provides for an unlimited suspension of a motor vehicle driver's license, in conflict with §322.28, F. S., which limits the suspension of a driver's license by the department of public safety to not more than one year?

An examination of Ch. 322, F. S., reveals that its primary purpose is public safety on the highways, and not the financial responsibility of drivers and operators of motor vehicles over the highway. This is indicated by those persons denied drivers licenses under §322.27. Under this section the suspension or cancellation of a driver's license, although it may be designed in part as a type of punishment for reckless and dangerous driving, is primarily to protect the driving public from reckless and

dangerous drivers of motor vehicles.

An examination of Ch. 324, F. S., reveals that its primary purpose is to insure the financial responsibility of those persons driving and operating motor vehicles over the highways of the state. Under this section the suspension or cancellation of drivers' licenses is primarily to insure the financial responsibility of such drivers, in that they are not permitted to drive motor vehicles over the highways until they have demonstrated their financial ability, through property owned or insurance carried, to respond for any damage that may be caused by their driving.

This being true, the suspension provided by §324.131, F. S., is designed to serve one purpose, and the suspension provided by §322.28, F. S., is designed to serve a different purpose. This being true, there is no conflict between said §§324.131 and 322.28, F. S.

058-75—February 28, 1958

TAXATION

DOCUMENTARY STAMP TAXES—TRANSFERS OF CERTIFICATES OF STOCK—§§608.39, 608.41, 608.42, AND 201.01, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where outstanding shares of stock in a Florida corporation are transferred in another state, which transfers are registered on transfer records in a state other than Florida, are such transfers of stock subject to the Florida documentary stamp statutes?

In *Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22, it was the practice of the corporation there involved "to keep a record of the owners of the stock. This record was accomplished by having the vendee bring in the stock certificate he had purchased from a previous stockholder and report such transfer to the company. The company then entered these facts upon its stock books and gave the new owner of the stock another certificate and cancelled the old one. The new certificate evidenced the fact that the stockholder was the owner of so many shares. The stubs were kept by the company showing the issuance of the new stock and who the owners were." From these facts the court concluded "that all of the shares of stock issued by the corporation in transfer for old shares of stock surrendered to the corporation under the facts set forth herein . . . are taxable and the corporation is liable for the tax." Here the transfer upon the records of the company in this state were held to be a taxable transfer under the laws of this state. This brings us to the question of the taxation of such transfers of stock where the corporate transfer records are maintained in another state and where the record of the transfer is made and new certificates issued in another state instead of in Florida, as was the case in *Gay v. Inter-County Tel. and Tel. Co., supra*.

The above question involves transfers of stock made upon stock transfer records maintained in other states by Florida corporations and where new stock is issued in exchange for the old stock. Stock issued by Florida corporations is "transferable on the books of the corporation in the manner and under such regulations as may be provided in the by-laws." . . . (§608.42, F. S.). The Florida Statutes seem to recognize the authority of Florida corporations to maintain

stock transfer records in other states (§608.39), and to cause its stock certificates to be signed in its name by transfer agents (§608.41). In this case nothing appears to indicate that the stock surrendered for reissue in the name of the assignee was in this state at the time of the transfer or that the reissued stock was subsequent to issue brought into this state. The Florida documentary stamp taxing statutes seem to impose the tax upon taxable instruments and transactions "made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the State of Florida." (§201.01, F. S.). Where there are transfer books maintained in another state for original entries, it is doubted that any transfer is made in this state, although duplicates of the said stock transfer entries are furnished the home office in this state. Transfer seems to be complete when the entries are made on the transfer records in the other state and certificates are there also issued and delivered.

The above stated question is generally answered in the negative; however, such question is controlled by the facts and circumstances in each individual case. We deem our opinion of Oct. 21, 1947 (047-359; 1947-8 Biennial Report 224) is not in conflict with this opinion or with *Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22.

058-76—February 28, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
FLORIDA FOOD, DRUG AND COSMETIC LAW—CONSTRUCTION OF: §500.03(3), F. S., DEFINING FOOD AS (a) FOOD OR DRINK—§500.25, F. S., RELATING TO FOOD CONTAINING ARTIFICIAL SWEETENER**

To: *Nathan Mayo, Commissioner of Agriculture, Tallahassee*
QUESTION:

Under the provisions of Ch. 500, F. S. (Florida food, drug and cosmetic law) do (a) beverage bases in powder, tablet, or liquid form, composed of nonnutritive products, containing artificial coloring, flavoring and sweetening substances, with citric acid or bicarbonate of sodium to produce effervescence, (b) beverage sipping straws impregnated with artificial coloring, flavoring and sweetening substance designed for use in consuming milk, (c) nonnutritive sweetening substances sold for use with food or drink, to act as a sweetening agent, constitute a food or drink as defined by §500.03(3), F. S., and marketed as special dietary foods, as required under the provisions of §500.25(1), F. S.?

Chapter 500, F. S., is a virtual adoption of the federal food drug and cosmetic act, and accordingly an adoption of the interpretation and construction applied to the federal statute, judicial and administrative. The statutory definition of "food" adopted by Ch. 500 of the Florida Statutes is in the identical words of the congressional definition. The federal decisions, while not expressly definite, tend to include substances used as a basis for the making of soft drinks, in which artificial food coloring, sweetening and flavoring, is added, and while neither a food nor drink in themselves, fall within the category of "food and drinks," and are subject to the application of the statute.

The former opinion of this office rendered on Jan. 23, 1957, interpreting §§500.25 and 500.26, F. S., is no longer applicable to the question presented here. During the 1957 session of the legislature Ch. 57-1 was enacted repealing §§500.25(1) and 500.26, F. S., as being obsolete and unenforceable and leaving effective only §500.25(2) of the prior chapter 500. The repealed sections dealt exclusively with the sale and distribution of saccharin and the penalty of forfeiture of saccharin and foods sweetened therewith, for adulteration.

The federal courts have held, in consideration of similar sections of the federal statute, that the addition of nonnutritive artificial sweetener to a product of food or drink does not constitute adulteration. It has further been decided that the presence of artificial sweetener in a food does not necessarily make that food one for "special dietary use" and thus subject to the provisions of §500.25(1) requiring the grouping of such foods at a separate space or location in all retail establishments, with special marking indicating that they are "special dietary foods."

Whether a rule or regulation requiring strict compliance by retail stores of the provisions of §500.25(1) as to separate location, and marking as special dietary foods, would meet the required degree of reasonable and indiscriminatory regulation is, according to judicial decisions upon the subject matter considered, very doubtful.

I conclude that the subject products are under the statute within the definition of "food and drinks," but the imposition of regulations with respect to their location, and designation in retail establishments are not authorized.

Supplement to 058-76—May 22, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
FLORIDA FOOD, DRUG AND COSMETIC LAW—CONSTRUING
§500.25(1), F. S., RELATING TO FOOD CONTAINING
ARTIFICIAL SWEETENER**

To: *Nathan Mayo, Commissioner of Agriculture, Tallahassee*
ADDITIONAL QUESTION:

Does §500.25(1) F. S., make it mandatory that all food and drink containing any artificial sweetener be grouped together at one place in all retail establishments, and plainly marked "Special Dietary Foods," and if not, what criteria are to be applied administratively to determine whether or not the requirement is mandatory in any specific instance?

The answer to your question is in the affirmative.

Statutes are classified with regard to construction and interpretation as: "mandatory" and "directive." Their classification is determined from the terminology employed in their enactment. If couched in mandatory or prohibitive language they are universally classed as "mandatory." If they be couched in language of a directory, permissive or discretionary nature they are classed as "directory."

Section 500.25(1), F. S., is prohibitive in nature. Its expressed purpose is to prohibit the manufacture, sale or delivery, or the holding and offering for sale, any food or drink for human con-

sumption, containing any artificial sweetener as a substitute for sugar, in whole or in part, within the state.

This prohibition is limited by proviso that food or drink, containing artificial sweetener, may be sold for special dietary use by persons requiring a sugar-free diet, when such food or drink is labeled and sold in accordance with special dietary food regulations to be established by the commissioner of agriculture, and by a further proviso that, under such circumstances, such food and drink shall be grouped together at one place, in all retail establishments, and plainly marked "Special Dietary Foods."

The provisions of the statute, both in text and the provisos, are imperative and commanding, and accordingly it falls within the classification "mandatory statute."

While the commissioner is authorized, by rule or regulation, to establish a formula or standard for special dietary food with respect to the labeling and sale thereof, he is not authorized by such rule or regulation to depart from the statutory commands. Since the statute by its terms does not set up any formal standard as to formula for special dietary foods, such regulation is left to the judgment and discretion of the commissioner, subject to the imperative requirements of the statute.

Under the subject statute, the sale or delivery, holding or offering for sale or delivery, of any food or drink containing artificial sweetener as a substitute for sugar, in part or in whole, is prohibited, with the exception of such food or drinks containing artificial sweetener as may be sold for special dietary use, by persons requiring a sugar-free diet, when such food or drink is labeled and sold in accordance with such special dietary regulations as are prescribed by the commissioner of agriculture, and further provided that such food or drinks in all retail distributing establishments, shall be grouped together in one location and specially marked "Special Dietary Food."

Nothing in this opinion is to be confused with sale of saccharin or saccharin-sweetened straws. Regarding such sales, 058-76 stated as follows:

The former opinion of this office rendered on January 23, 1957, interpreting §§500.25 and 500.26, F. S., is no longer applicable to the question presented here. During the 1957 session of the Legislature Ch. 57-1 was enacted repealing §§500.25(1) and 500.26, F. S. 1955, as being obsolete and unenforceable and leaving effective only §500.25(2) of the prior Ch. 500. The repealed sections dealt exclusively with the sale and distribution of saccharin and the penalty of forfeiture of saccharin and foods sweetened therewith, for adulteration.

058-77—February 28, 1958

ELECTORS AND ELECTIONS

BOND REQUIREMENTS FOR CHAIRMAN AND TREASURER OF POLITICAL PARTY EXECUTIVE COMMITTEES—

§§103.121(4) (AM. 57-743) AND 103.081, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTIONS:

Under the provision of §103.121(4) F. S., requiring the giving of bond by the treasurer of a political party executive committee:

1. To whom should the bond be made payable?
2. Where should the bond be filed?
3. Does the executive committee treasurer have authority to act prior to the approval of the bond?
4. Whose responsibility is it to enforce this act?
5. Who should approve the bond?
6. Who sets the amount of the bond when minimum is not adequate?

Chapter 57-743 provides as follows:

Section 1. Subsection (4) of Section 103.121, Florida Statutes, is amended to read:

103.121 *Powers and duties of executive committees.*—

(4) the Chairman and treasurer of an executive committee of any political party shall be accountable for the funds of such committee and jointly liable for their proper expenditure for authorized purposes only. The treasurer of the state executive committee of any political party shall furnish adequate bond, but not less than ten thousand dollars, conditioned in effect upon the faithful performance by such party officer of his duties and for his faithful accounting for party funds which shall come into his hands; and the treasurer of a county executive committee of a political party shall furnish adequate bond, but not less than five thousand dollars, conditioned as aforesaid. The funds of each such state executive committee shall be publicly audited at the end of each calendar year and a copy of such audit furnished the attorney general for his examination prior to April 1, of the ensuing year. Copies of such audit when filed with the attorney general shall become public documents. The treasurer of each county executive committee shall maintain adequate records evidencing receipt and disbursement of all party funds received by him, and such records are subject to inspection by any member of the party represented by the committee, and by the state attorney of the judicial circuit in which the executive committee is located.

Section 2. This act shall become effective on July 1, 1957.

AS TO QUESTION 1:

The law is silent as to whom the bond should be made payable but inasmuch as similar bonds are customarily made in favor of the governor of the state it is assumed that the legislature intended these bonds to be made in his favor or they would have provided otherwise.

It is my opinion the bonds provided for in Ch. 57-743 should be made payable to the governor.

AS TO QUESTION 2:

Chapter 57-743 contains no provision as to where the bond should be filed. Section 103.081, F. S., requires that:

The state executive committee of each political party shall file with the secretary of state the name of the political party it was elected to manage and the name and address of its chairman, vice-chairman, secretary and treasurer.

The county executive committee of each political party shall file with the clerk of the circuit court of its county the name of the political party it was elected to manage and the name and address of its chairman, vice-chairman, secretary and treasurer. (Emphasis supplied.)

It appears that it would meet the requirements of practicality and the law to have the state executive committee treasurer file bond with the secretary of state and have the county executive committee treasurer file bond with the clerk of the circuit court.

AS TO QUESTION 3:

Where a bond is required, its filing is generally a part of the qualification of the officeholder and, therefore, a prerequisite to assumption of the office. In absence of a statutory provision to the contrary in the instant case it is my opinion that the political party executive committee treasurer does not have authority to act until the approval of the bond provided for in the chapter under discussion.

AS TO QUESTION 4:

Since no method of enforcing Ch. 57-743 is contained therein it would appear most practical to place the preliminary responsibility of enforcing the act with the political party executive committee. In my opinion it should be the duty of the members and officers of the committee to insure that adequate bond is approved prior to the performance of any duties by the treasurer. If the treasurer should refuse to be bonded then it would be the duty of any member or officer of the committee to advise the local county solicitor or state attorney so that appropriate action might be taken.

AS TO QUESTION 5:

The new act is silent as to whom the bond approving authority should be. Inasmuch as the political party executive committee would in each instance apparently be in the best position to approve said bond, it is my opinion that the executive committee is the proper group to approve the bond provided for in Ch. 57-743.

AS TO QUESTION 6:

The question of adequacy is a discretionary matter which may differ with each political party executive committee. Since each committee should be the best judge of its own activities and since the act does not place the responsibility of determining the adequacy of the bond with any particular party, it is my opinion that the political party executive committee should set the amount of bond when the minimum provided for in the act is inadequate.

058-78—February 28, 1958

TAXATION

HOMESTEAD—FALSE AFFIDAVITS—PENALTY—§§192.15, 192.16(3), 776.011, F. S.

To: Charles R. P. Brown, Assistant State Attorney, Fort Pierce
QUESTIONS:

1. Is a person who makes a false affidavit for the purpose of claiming homestead exemption guilty of a misdemeanor or a felony under §192.16(3), F. S.?

2. Is a person who knowingly aids, abets, counsels, hires or otherwise procures another to make a false affidavit for the purpose of obtaining homestead exemp-

tion guilty of a misdemeanor or a felony under §776.011, F. S.?

AS TO QUESTION 1:

Section 192.15, F. S., requires that the comptroller furnish to the assessor of each county a sufficient number of printed forms to be filed by taxpayers claiming to be entitled to homestead exemptions and sets forth a form to be substantially followed.

Section 192.16(3), F. S., reads as follows:

192.16 *Homestead exemptions; claims.*— * * *

(3) Any person who shall knowingly give false information for the purpose of claiming homestead exemption as provided for in this chapter, *specific reference being hereto made, to the information requested in the form provided for in §192.15*, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars or shall be imprisoned in the county jail for not more than six months or both such fine and imprisonment. (Emphasis supplied.)

If it were not for §192.16(3), it would appear that if a person making and filing an affidavit in accordance with §192.15 should wilfully swear falsely in such affidavit in regard to any material matter for the purpose of claiming a homestead exemption, he would be subject to prosecution for perjury under §837.01, F. S., and would be guilty of a felony.

However, as I construe §192.16(3), which specifically refers to information requested in the affidavit form provided for in §192.15, it was intended by the legislature that said §192.16(3) should prescribe the punishment for making a false statement in such an affidavit for the purpose of claiming a homestead exemption, and it is therefore my opinion that §837.01 is not applicable to the making of such a false affidavit.

Section 192.16(3) provides that a person violating its provisions shall be deemed guilty of a misdemeanor and this provision is controlling. Even if the statute did not specify whether a violation thereof should be a misdemeanor or a felony, such a violation would still be a misdemeanor by reason of the provisions of §775.08, which prescribes that every offense is a misdemeanor unless it is punishable by death or imprisonment in the state prison, because neither type of punishment is authorized by §192.16(3).

AS TO QUESTION 2:

Section 776.011, F. S., which became effective on June 3, 1957 as Ch. 57-310, reads as follows:

776.011 *Principal in first degree.*—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

Under this statute, a person who knowingly aids, abets, counsels, hires or otherwise procures another to make a false affidavit for the purpose of obtaining homestead exemption is guilty of the crime denounced by §192.16(3) as a principal in the first degree and in my opinion he is therefore guilty of a misdemeanor, just as is the per-

son knowingly making an affidavit for the purpose of claiming home-stead exemption.

058-79—March 3, 1958

ELECTORS AND ELECTIONS

REGISTRATION; VOTING, BALLOTS, ETC.—§§101.35, 101.71, 98.011 AND 98.051, F. S.

To: *James L. Graham, Jr., Attorney, State Association of Supervisors of Registration, Tallahassee*

QUESTIONS:

1. Should the name of an unopposed candidate for precinct committeeman appear on the second primary ballot or should he be considered as being elected to the office by virtue of having no opposition, as is the case with candidates for a party nomination to an elective office?

2. What are the dates for the closing of registration books prior to a first primary election and for the opening of the books following the general election, and at what time on such dates should the books be opened or closed?

3. During the time that the books are closed for the first primary, is it legally permissible for a supervisor to accept registrations for the second primary up to 30 days before the date of the second primary, and, similarly, could registrations be taken while the books were closed for the first or second primary but prior to 30 days before the general election? In this regard your attention is directed to opinion 052-267, on p. 111 of your 1951-52 Biennial Report in which you concluded that registrations for a general election could be taken while the books were closed for registration as to a special primary election.

4. Does the law require that voting machines be returned to storage between the first and second primary elections and between the second primary election and the general election or is it permissible for them to remain at the polling places if appropriate safeguards are observed?

5. Does §101.71 (2), F. S., permit the permanent moving of a precinct polling place or must the procedure prescribed therein be followed prior to each primary, general or special election?

6. Where a vacancy occurs on a county school board, does the successor appointed by the governor serve for the unexpired term, or is it necessary for the appointee to seek election for the last two years of the term if there should be a general election following his appointment?

AS TO QUESTION 1:

The question was answered as follows in A. G. O. 054-72 (1953 Biennial Report, p. 90):

The name of a candidate for the office of member of a party executive committee, who has no opposition, is not required to be printed on the primary election ballot, and in pursuance of the provisions of §99.041 such a

candidate shall be declared elected for the office he seeks.

AS TO QUESTION 2:

"... All the registration books close on the thirtieth day preceding the day on which there is a primary or general election and remain closed for five days following the election . . ." (98.011, F. S.). Therefore, *the registration books will be closed from 5 p. m. on Aug. 9, 1958 until 9 a.m. Nov. 10, 1958.* It is noted that Aug. 9, 1958 falls on a Saturday, however, in those cases where the 30th day preceding an election shall fall on a Sunday (as in the instant case) or a legal holiday, the books shall close at 5 p.m. on the preceding Saturday. See A. G. O. 054-66, (1953 Biennial Report, p. 73).

AS TO QUESTION 3:

... All the registration books close on the thirtieth day preceding the day on which there is a primary or general election and *remain* closed for five days following the election. No person shall register at any time *other* than during the period provided for registration of electors . . ." (§98.011). (Emphasis supplied.) The books shall close on the thirtieth day before each election at 5 o'clock p.m. and *remain* closed for five days after the election, after which they shall be open for permanent registration . . ." (§98.051 (3)). (Emphasis supplied.)

The above cited sections do not appear to contemplate that the registration books will be open for any purpose during the 30-day period prior to an election and five days thereafter. There would be grave doubt as to the regularity and legality of a registration made at a time when the law apparently requires the registration books to be closed. In 1884 the Florida supreme court held in *State v. Sumter County Commissioners*, 20 Florida, 859, that a registration of voters made at a time, or in another manner, than that prescribed by statute, is not a legal registration. It appears that this well established precedent is still in effect. This decision may appear harsh to those persons who do not become eligible to vote in the general election until after the books close for the first primary inasmuch as there will be insufficient time for the books to reopen between the coming primaries and general election. However, it is foreseeable that some amount of confusion and turmoil as well as possible litigation could result from intermittent and irregular opening of the registration books between elections so as to accommodate a limited number of electors in isolated circumstances. It is the opinion of this office that the registration books should be closed without exception during the period mentioned in the answer to question 2 above.

Reference in your letter to A. G. O. 052-267, 1951 Biennial Report p. 111, has been noted. It is felt however, that a valid distinction exists between the situation under consideration at that time and the question contemplated herein. The elections now under consideration are regular, primary and general elections which under the provisions of the current law will follow in close sequence whereas the question previously considered involved a *special* party primary.

AS TO QUESTION 4:

I find no statute requiring voting machines to be returned to a storage warehouse between the first and second primaries or between the second primary and the general election. However,

§101.35, F. S., provides for an inspection of the voting machines by an authorized officer and grants authority to the candidates to inspect voting machines prior to elections. With the increased use of voting machines it would be almost impossible in some of the larger counties to transport all of the machines to a central warehouse for inspection in time to have the machines returned to the polls for the following elections in instances where there are several elections in rapid sequence such as is foreseeable at the end of this year. It is the opinion of this office that the legislature did not intend to place a transportation burden upon the supervisors of registration or a heavy financial burden upon the taxpayers where such is unnecessary. On the other hand the legislature probably did not intend for the candidates and their representatives to have to run hither and yon to the various and sundry outlying precincts to inspect the machines prior to each election. As a compromise it is suggested that in all cases where appropriate safeguards are not available, the voting machines should be returned to a central warehouse. This is not to be construed as meaning a single central warehouse although it is doubtful that any one county would have more than three or four warehouses for the storage of voting machines. In those cases where the voting machines can remain at the precincts under proper safeguards between elections they should be left unless it appears that this procedure will place an excessive hardship on any candidate desiring to inspect the machines. The question of determining whether or not a hardship actually exists is one which rightfully falls within the discretion of the county supervisor of registration and it should be up to that officer to weigh the inconvenience and expense involved in transporting any machine against the hardship to be endured by the candidate. The supervisors should be as fair and equitable as possible in considering the rights of each candidate as opposed to the expense of the taxpayers and inconvenience to public officials.

AS TO QUESTION 5:

It is my opinion that §101.71 (2), F. S., does not contemplate a permanent removal of any election precinct. The language of the act mentions "such election" throughout and it clearly relates to the removal of a precinct to accommodate an emergency situation in a single election. It has been pointed out that the intent of this section could easily be circumvented by a single resolution of the county commission 60 days prior to several elections running in close sequence. However, it is the opinion of this office that the legislature intended for precinct locations to remain permanent and stable and continued use of a temporary location cannot be condoned as being within the meaning of §101.71 (2) F. S. Accordingly, this office is of the opinion that the county commissioners should pass a separate resolution for *each* election with regard to establishing any temporary polling place under the provisions of this section.

AS TO QUESTION 6:

The Florida supreme court has held *In re Advisory Opinion to the Governor, Fla., 46 So. 2d 21* and in *Advisory Opinion to the Governor 154 Fla., 822, 19 So. 2d 198* that members of county school boards are statutory elective officers, and therefore, a vacancy, on such a board should be filled by appointment by the governor for the balance of the unexpired term and should not be limited to expire on the 1st Tuesday after the 1st Monday in January after the next general election.

058-80—March 10, 1958

TAXATION

EXEMPTIONS—"WIDOW" WITHIN PURVIEW OF §9, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a woman, widowed by the death of her husband, subsequently marries another and is subsequently divorced, is she, subsequent to the said divorce, entitled to the widow's exemption provided by §9, Art. IX, State Const.?

Under §9, Art. IX, State Const., "there is exempt from taxation property to the value of five hundred dollars to every widow . . . who is a bona fide resident of the state . . ." Prior to the 1940 amendment of this section, the exemption ran "to every widow that has a family dependent upon her for support . . ." This section was new in the state constitution of 1885.

The word "widow" is used in the English language in at least two different senses: (1) in one sense it is used to indicate the *person* of a surviving spouse, which relation is not changed by remarriage; however, (2) in another sense it is used to designate a woman's *marital state or condition*, which relation is changed by remarriage (94 C. J. S. 616-618; 45 Words and Phrases 144-146; *Henderson v. Usher*, 125 Fla. 709, 170 So. 846, text 850). It seems evident from the history and contents of §9, Art. IX, State Const., that the term "widow" used therein refers to the marital state or condition of a woman; and that the purpose of the constitutional provision was to assist a woman, often with a family dependent upon her for support, who has been widowed by the death of her husband. There was no intention by the framers of the constitutional provision or those adopting it to allow the assistance of said §9 to a woman having a living husband obligated for her support, although she may have been previously widowed by the death of a previous husband.

We come now to the marital state or condition of a woman, under said §9, Art. IX, who, although widowed by the death of her husband, has remarried but which marriage has been dissolved by divorce.

It has been held by this office several times that a divorcee is not a widow within the purview of said §9, Art. IX, State Const., and is not entitled to the benefits thereof. Although the personal status of a woman widowed by the death of her husband, as the widow of the decedent, is not changed by remarriage, her marital state or condition is changed by remarriage and she is no longer a widow in that sense of the word, at least so long as the second marriage continues undissolved. Constitutional and statutory provisions for tax exemptions are to be strictly construed against the claimant and in favor of the taxing power in cases of doubt (*Orange County v. Orlando Osteopathic Hospital*, Fla., 66 So. 2d 285; *Overstreet v. Tubin*, Fla., 53 So. 2d 913).

When we take into consideration the purpose of §9, Art. IX, State Const., and the fact that divorced women have claims for support upon their divorced former husbands that women widowed by death do not have, sufficient doubt seems to exist as to the

intent and purpose of said §9 to apply the above rule of construction and answer the above question in the negative.

058-81—March 10, 1958

TAXATION

INTERNAL IMPROVEMENT AGENT—RECOVERY OF COST
FOR ADVERTISING, ETC. FOR TAX CERTIFICATE
LATER FOUND VOID—§§194.35 ET SEQ.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

When an agent of the trustees of the internal improvement fund receives an application for the purchase of land which purportedly reverted to the state through tax certificate:

1. May the agent recover his costs from the board of county commissioners, when the certificate is found worthless?

2. If question 1 is answered in the negative, may the agent recover from any source?

I assume that your request for opinion deals specifically with the clerk of the circuit court of Alachua county, and this opinion will deal specifically with the law as applied to that county.

The usual method used by the clerk of the circuit court upon receipt of an application for a tax deed, in the absence of any special legislation, is to require a deposit of an amount sufficient to cover costs of advertising and other necessary expenses. I held in opinion 054-229, (A.G.O. 1953-54, p. 225), dated Oct. 4, 1954, that an applicant for a tax sales certificate was not entitled to a refund for the expenses incurred for tax searches made and other services performed upon a determination that the tax sales certificate was void. I said in that opinion:

Unless the description in a tax assessment or tax sale certificate is such that a surveyor may take that description and locate the lands purported to be assessed or sold, the said assessment and tax sale certificate is invalid (see *Inter-City Security Co. v. Barbee*, 106 Fla. 671, 143 So. 791; *Brickell v. Palbicke*, 123 Fla. 508, 167 So. 44). The lands purported to be described in this case being nonexistent they could not be located by a surveyor. The purchaser of the invalid tax sale certificate was not a bona fide purchaser, and, therefore, took the same with all its infirmities (85 C. J. S. 322 and 351, §§905 and 913). The refund of taxes paid for an invalid tax sale certificate is a matter of legislative grace and not of right (84 C. J. S. 1263, §631). In the absence of a statute no refunds may be made. Upon the cancellation of the invalid tax sale certificate, in accordance with §§194.35, et seq., F. S., the amount paid for such invalid tax sale certificate, together with any amounts paid for subsequent omitted taxes, may be refunded as is provided in and by said statutes. We find no provision in the statutes for refunding deposits made or funds advanced for costs, in so far as such costs have been incurred or paid out. Fees paid the clerk for tax searches made and other services performed or to be performed may not be refunded after they

have been incurred. Funds advanced for costs but unused or unincurred evidently may be refunded by the clerk.

The clerk of the circuit court in the sale of lands, which reverted to the state, acts as an agent of the trustees. He, therefore, cannot charge his expenses to the board of county commissioners in the situation you pose. Neither do I believe that the clerk can in this instance charge his expenses to the trustees. He should have withheld from the applicant an amount sufficient to cover his necessary expenses, and any recovery now available is from the applicant.

The above answer is true in those counties having no legislation regulating costs, and in those counties having legislation, prior to the effective date of such legislation. Chapter 57-625 became a law on Oct. 1, 1957; this act provides in part:

In all counties having a population of more than fifty-seven thousand inhabitants and less than fifty-eight thousand inhabitants, the board of county commissioners is authorized and directed to reimburse the clerk of circuit court for all expenses incurred by him in connection with the application for sale of land pursuant to Chapter 18296, Acts of 1937, where the tax certificate involved is subsequently cancelled by reason of error in the assessment of taxes for the year of issue. Such reimbursement shall be paid out of the item of the general fund budget provided for that purpose.

In keeping with the long established policy of my office, no comment will be made herein as to the constitutionality of Ch. 57-625, but for the purposes of this answer, I assume its constitutionality.

Prior to Oct. 1, 1957, the agent in Alachua county has to look to the applicant for his costs, etc. Subsequent to the effective date of Ch. 57-625, the agent can recover from the board of county commissioners these costs.

Your question is answered accordingly.

058-82—March 10, 1958

PUBLIC LANDS

TIME FOR FILING APPEAL FROM ESTABLISHMENT OF BULKHEAD LINE—APPROVAL BY TRUSTEES OF INTERNAL IMPROVEMENT FUND—§253.122, F. S.

To: *Van H. Ferguson, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTION:

From what date does the 30 day appeal provision of §253.122(5), F. S., begin to run?

The pertinent part of §253.122(5) provides:

Any person, natural or artificial, (including riparian owners) aggrieved by any decision of the board of county commissioners or governing body of any municipality or trustees of internal improvement fund establishing a bulkhead line may, within 30 days thereafter, appeal such decision to the circuit court exercising jurisdiction in the county where such bulkhead line is established...

Section 253.122 provides three methods by which bulkhead

lines may be established:

(1) By the board of county commissioners on their own initiative, subject to approval by the trustees of the internal improvement fund; and

(2) Upon application of the upland riparian owner the board of county commissioners or governing body of a municipality shall fix a bulkhead line.

(3) If the board of county commissioners or governing body of the municipality fail to fix the bulkhead line within 60 days the trustees of the internal improvement fund shall fix it.

It is necessary in answering your question to read all subsections of 253.122 together and thereby ascertain the intent of the legislature. Subsection (1) specifically requires approval by the trustees of any bulkhead line fixed by the local authority. This approval by the trustees is not specifically required under the provisions of subsection (2); however, in opinion 057-269, dated September 10, 1957, I held the advertising provisions of (1) must be read together with (2) and (3) and thus applied to all three subsections. I believe, under the same authority, the approval of the trustees is also required when a bulkhead line is established under the provisions of 253.122(2).

The purpose of the bulkhead act is to permit local governmental authorities to establish bulkhead lines, but the legislature did not intend to exclude the trustees of the internal improvement fund from protecting those lands which it holds in trust for the citizens of the state. The state holds title to lands under navigable waters in trust to be administered in the public interest. *Hicks v. State ex rel. Landis*, 116 Fla. 603, 156 So. 603; *Caples v. Taliafano*, 144 Fla. 1, 197 So. 861. Foreshore lands to the ordinary high water mark are also included in the lands held by the state in trust. *White v. Hughes*, 139 Fla. 54, 190 So. 446; *State v. Gerbing*, 56 Fla. 603, 47 So. 353, 22 L. R. A. (N.S.) 337. The legislature requires the approval of the trustees to a local decision. We do not feel the trustees are to be an appellate administrative tribunal in this respect, but merely given the right to approve or disapprove the bulkhead line after a determination of its effect upon state lands and public rights therein. Until such time as the trustees have either approved or disapproved a bulkhead line, I do not believe there is a final decision from which an appeal will lie. Florida Statutes, §59.02(4), provides:

Appeals from orders of state boards, commissions, and other bodies, except where otherwise expressly provided by law, shall lie only from such orders as are final in their nature.

The trustees' approval is a part of the administrative procedure provided by the act, and until that agency has acted the administrative procedure is not complete.

The bulkhead line, therefore, in (1) and (2) is set by the local authority, but it is not a final decision from which an appeal will lie until the trustees have approved or disapproved. In §253.122(1) and (2) the thirty day period does not begin to run until the trustees have approved or disapproved as contemplated by the statute.

Section 253.122(3) contemplates a bulkhead line fixed by the trustees. The thirty days begin to run under this subsection from the date the trustees fix the bulkhead line.

Your question is answered accordingly.

058-83—March 10, 1958

TAXATION

EXEMPTIONS—MUNICIPAL PROPERTY—CONTRACT TO
SELL AND CONVEY

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a municipality in this state enters into an agreement, with a person, firm, or corporation, for the sale and conveyance of a tract of municipally owned real property, for a stated consideration paid and to be paid as stated in said agreement, is such property subject to ad valorem taxation as property of the purchaser?

It appears from the file that the property in question, prior, however, to the making of the said agreement, was granted exemption from taxation for the years 1956 and 1957 as municipal property; we shall, therefore, presume *but not decide* that the said property except for the contract to convey in question would be entitled to exemption. We are informed that the agreement entered into or to be entered into states that the property in question "is not needed and serves no useful purpose in connection with the maintenance and operation of the water works system of the city," and that for the consideration mentioned in the said agreement the municipality "agrees to sell to the developer and the developer agrees to purchase and develop the real estate" described in the agreement. We are not advised what part or percentage of the contract purchase price has been paid by the developer to the municipality.

Contracts for the sale of land transfer to the purchaser the equity in the land. That equity is realty. It is owned by the vendee, although the legal title may be retained by the seller as security. In substance the seller, through his legal title retained, is in the position of a mortgagee. "When the vendee enters into possession of the real estate under contract of purchase it becomes subject to the jurisdiction of the state for tax purposes," where the fee title is exempt from taxation, unless the vendee be also entitled to tax exemption (*S. A. R. Inc. v. Minnesota*, 327 U. S. 558, 66 S. Ct. 749, 90 L. ed. 851, text 857; *Bancroft Investment Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 163, text 169). These cases involved contract sales of lands by the U. S. to individuals or corporations. However, where the purchaser has not taken possession of the property purchased or where the sale is conditional, or where the contract for some reason is not binding, the property should not be taxed in the name of the vendee (61 C. J. 211, §187; 84 C. J. S. 213-4, §98).

An equitable interest of a vendee in possession, under contract from the U. S., was held subject to taxation, in *Bancroft Investment Corp. v. Jacksonville*, supra. In this case, as well as in *S. A. R. Inc. v. Minnesota*, supra, the tax assessment expressly exempted the title and interest of the U. S. from the assessment imposed. We doubt that a municipality as vendor stands in any more advantageous position than did the U. S., in *S. A. R. Inc. v. Minnesota* and *Bancroft Investment Corp. v. Jacksonville*, above mentioned, as to the county's right to impose taxes on the equitable interests of vendees in possession.

If the factual conditions and circumstances are substantially the same as those involved in the above mentioned federal and state

supreme court decisions, then we think that the above question should be answered in the affirmative, unless there be some valid statute or law granting express exemption for the properties in question.

058-84—March 10, 1958

TAXATION

DELINQUENT TAX SALE—DISMISSAL OF INJUNCTION SUIT—§§193.41, 193.51, 193.59 AND 194.47, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a tax collector was served with an interlocutory injunction prohibiting the sale of certain lands for delinquent taxes, which injunction remained in force for several years, how should the said tax collector proceed upon dissolution of such injunction?

The tax collector in this case was served with an injunction around May 29, 1953, prohibiting the sale of certain real estate for delinquent taxes pending the determination of the cause, which injunction remained in force and effect until about Nov. 15, 1957, when the cause was dismissed and the said interlocutory injunction dissolved. The said order of Nov. 15, 1957, dismissed the complaint and denied the relief therein prayed. The dismissal of the complaint in effect held the tax assessments against the property valid for the tax years of 1952, 1953 and 1954, which tax assessments, upon the dismissal of the said complaint, remained delinquent since the first of April following the year for which the taxes were assessed (§§193.41 and 193.51, F. S.).

Had there been no injunction against the tax collector prohibiting the sale of the lands for taxes, the taxes for the years above mentioned would have borne interest at the rate of 18% from delinquency (April 1) until the delinquent tax sale, and from the date of the sale until April 1 following at the rate of 12% and thereafter at the rate of 8% per annum. Although no delinquent tax sale of the above lands has been held, the tax lien to secure the principal and the above interest and penalties is in full force and effect (§192.21, F. S.; *State v. Gay*, 133 Fla. 826, 183 So. 463) and such interest and penalties have accrued and would be payable upon application to redeem.

It is, therefore, our suggestion that the tax collector at the next regular delinquent tax sale issue a tax sale certificate for each of the above delinquent tax years, following the form usually used (§193.59, F. S.), showing on separate lines the principal, interest at 18% from April 1 until the date the tax sale for the particular year was actually held, interest on the above until April 1 of the following year, and thereafter at the rate of 8% (see opinion of July 24, 1953 053-168; 1953-54 Biennial Report 227). This certificate should be issued to the county as is the case where no bid is made for the taxes by another.

As an alternative it would seem that a lien exists to secure the payment of the taxes, although no tax sale certificate has yet been issued (*State v. Gay*, supra,) which would be subject to foreclosure under §194.47, F. S., at the next such proceeding by the county; however, a certificate of the taxes due, deter-

mined as above should be issued by the tax collector to the county to form the basis for such a suit.

These observations seem to answer the above stated question.

058-85—March 10, 1958

CRIMINAL PROCEDURE

ISSUANCE OF WARRANT BY JUSTICE OF THE PEACE FOR NEGLECT OR REFUSAL TO COMPLY WITH SUPPORT OR ALIMONY DECREE—§856.04, F. S.

To: Clyde M. Kissinger, Judge, Justice of the Peace Court, St. Petersburg

QUESTION:

Where there is an existing order of the circuit court for the payment of alimony or support, does the justice of the peace court have the authority to issue a warrant under the criminal action for nonsupport?

In discussing this question I shall assume that the warrant you contemplate issuing is for withholding support subsequent to the existence of the support or alimony decree.

Section 856.04, F. S., relating to the nonsupport of a wife and children, provides in part:

856.04 *Desertion of wife and children; withholding support; proviso; bond and release.*—Any man who shall in this state desert his wife and children, or either of them, or his wife where there are no children or child, or who shall withhold from them or either of them, the means of support, or any mother, when required by law to care for and support her child or children, who shall desert such child or children, or who shall withhold from them, the means of support, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison not exceeding one year, or by fine not exceeding one thousand dollars;”
(Emphasis supplied.)

The existence of an alimony or support decree does not divest the criminal courts of their jurisdiction, and its existence cannot prevent a prosecution for any violation of the nonsupport provisions of §856.04, F. S.

However, it must be remembered that this statute is not a substitute for civil proceedings and must not be used as a wedge to force an increase in any existing support or alimony requirement. Therefore, if the husband or father is complying with the provisions of such a decree no prosecution can be commenced. It must be assumed that by complying with the terms of the alimony or support decree the husband or father is fulfilling his duty to support his wife and children.

If the husband or father neglects or refuses to support his children and wife as required by the terms of the decree, he would be subject to criminal prosecution. To this effect the rule found in 67 Corpus Juris Secundum, “Parent and Child,” §93, at p. 832, is most appropriate:

. . . With respect to the statutory offense of neglecting or refusing to support, although there is some authority which is apparently to the contrary, it is generally

held that he may be charged with such statutory offense if he thereafter willfully neglects or refuses to provide such support in compliance with the decree, . . .

Inasmuch as the reasoning behind the above rule would apply to both support and alimony decrees, a warrant could be issued where the husband or father has violated the decree.

Subject to the above conditions, your question is answered in the affirmative.

058-86—March 10, 1958

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—APPLICATION FOR AND PROCUREMENT OF DRIVER'S LICENSE OR LICENSE TAG WHILE LICENSE SUSPENDED UNDER CH. 324, F. S.—§§324.221, 324.201, 910.06, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTIONS:

John Doe lives in Jacksonville and buys a driver's license or automobile tag in Pensacola while his privilege to do so is under suspension by the financial responsibility division.

1. Can he be prosecuted under §324.221, F. S., in his county of residence (Duval) or must he be prosecuted in Escambia county where the items were illegally purchased?

2. Are there other pertinent statutes under which he can be successfully prosecuted in his home county of Duval?

AS TO QUESTION 1:

Section 11, Declaration of Rights, State Const., provides: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, *in the county where the crime was committed*, . . ." (Emphasis supplied.) If a person whose driver's license or automobile registration and license are under suspension by the financial responsibility division fraudulently applies for another driver's license or automobile tag, the crime is committed in the county in which the fraudulent application is made. On the facts as stated above, John Doe could be prosecuted only in Escambia county.

If the fraudulent application was made by mail rather than made personally in Pensacola, the result would be otherwise. Section 910.06, F. S., provides: "Where a person in one county commits an offense in another county, the trial may be in either county." If John Doe mailed his fraudulent application to Pensacola from Jacksonville he could be prosecuted in either Escambia or Duval counties.

AS TO QUESTION 2:

Section 324.201, F. S., provides: "It shall be unlawful for any person whose license has been suspended to operate any motor vehicle, . . ." If John Doe operates any motor vehicle in Duval county, or in any other county in this state while his driver's license is under suspension by the financial responsibility division, it is clear that he could be prosecuted in that

county for this offense.

These observations seem to answer your questions.

058-87—March 10, 1958

STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—LEGISLATIVE SERVICE—§§122.05,
122.02, AND 123.03, F. S., §5, ART. III, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a member of the state and county officers and employees retirement system is entitled to service credit as a former member of the legislature, is he, when determining the aggregate number of years of such service credit, entitled to credit for each full term as a legislator or merely for the time when in attendance at legislative sessions?

A consideration of the following provisions of Ch. 122, F. S., relating to the state and county retirement system, will assist in determining the answer to your question:

Subsection (1) of §122.02, F. S., where material, provides that state and county officers and employees entitled to benefits of the state and county retirement system shall include all "*full-time officers or employees* who receive compensation for services rendered from state or county funds." (Emphasis supplied.)

Subsection (5) of §122.02 defines aggregate number of years of service for retirement purposes, other than time spent in the military, as "*the total number of years, and fractional parts of years, of service of any officer or employee, omitting intervening years and fractional parts of years, when such officer or employee may not be employed by the state or county.*" (Emphasis supplied.)

Subsection (1) of §122.05 provides that: "*the aggregate days of service heretofore or hereafter rendered the state legislature, as a member of the senate or house of representatives by any participants of the state and county officers and employees retirement system shall be computed as a part of the aggregate years of state or county service of such participant in said retirement system. . . .*" (Emphasis supplied.)

Subsection (3) of §122.05 provides that: "*any member of the legislature on the effective date of this chapter may claim credit for all prior service as such member by paying into the state and county officers and employees retirement fund the required amount as computed by the comptroller, plus three percent interest per annum, and upon making such payment shall be entitled to receive credit for his full terms as such legislator. . . .*" (Emphasis supplied.)

Subsection (3) of §122.05 was added to the retirement act in 1955, whereas subsection (1) was provided in 1949 through Ch. 25375.

The use of the expression "full terms" in subsection (3) should be noted, inasmuch as there appeared to be some question prior to the enactment of such subsection as to whether subsection (1) meant to restrict the credit toward retirement to the actual days served during legislative sessions. However, it is the opinion of the writer that the inclusion of subsection (3) put to rest any such doubt in its incorporation of the expression "full terms."

As the court, in *California School Township v. Kellogg*, (1941) 109 Ind. App. 117, 33 N. E. 2d 363, stated:

If it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

To like effect is *Gay v. Canada Dry Bottling Co.*, 59 So. 2d 788, wherein the Florida supreme court, in referring to a subsequent change in a legislative act, stated:

This change may be considered in determining the scope of the tax statute at the time of the transactions here involved for in view of an amendment to the Retail Sales Tax Act at a time when certain groups were resisting collection of taxes assessed against them, *the court could infer a legislative intent to clarify rather than change the existing law.* (Emphasis supplied.)

Although subsection (3) was enlightening in that it clarified the former intent of the legislature, it nevertheless, by its language, raised the question of whether such clarification would inure to the benefit of all former members of the legislature or whether it would be restricted to members of the 1955 legislature who had former legislative service. However, it is the opinion of the writer that if a construction were placed on such provision which would not permit its application uniformly to all former members of the legislature, such construction would most likely be considered constitutionally objectionable. On the other hand, if such provision were subject to judicial scrutiny, the court would most likely apply the principle of statutory construction which requires a constitutional construction wherever possible in an effort to uphold the benefits or remedy afforded by the statute in question. If such were done in the instant case the court would construe subsection (3) of §122.05, *supra*, as being applicable to all former members of the legislature.

For whatever additional persuasion in the acceptance of the foregoing conclusion it may provide, it is noted that a substantially similar question was raised in the case of *E. Clay Lewis, Jr. v. Ray E. Green*, State Comptroller, case No. 14618, 2nd judicial circuit, under subsection (3) of §123.03, F. S. This subsection was enacted at the same session of the legislature as subsection (3) of §122.05, and in summary provided that a justice may receive credit in the judges' retirement system for the "total time spent as a state or county officer or employee" by paying into the judges' retirement fund 5% of the salary he received from the state and county as an officer or employee.

In the aforementioned case the defendant state comptroller asserted the proposition that the language of §1 of Ch. 25375, 1949, meant that credit toward retirement for a former member of the legislature was allowable only for the days served during legislative sessions, and not for the full terms for which elected. In holding against such proposition, Judge Taylor in his declaratory decree dated March 2, 1956, stated that "former members of the Florida Legislature who are participants in, and comply with the provisions of Chapter 29838, *supra*, are entitled to have the full terms which they served as members of the legislature added to and computed with their service as Circuit Judges as provided

by said act." (Emphasis supplied.) Attention is directed to the fact that §1 of Ch. 25375, supra, later became subsection (1) of §122.05, supra, which subsection is the subject of the instant inquiry.

Reference to the Florida constitution reflects that membership in the legislature is contemplated as full-time duty. Under §5, Art. III, State Const., a member of the legislature may not, during the time for which elected, be appointed or elected to any civil office under the state constitution which was created, or the emoluments of which were increased, during his term. Likewise, under §15, Art. XVI, such members may not at the same time hold another state or federal office. Under these provisions of the constitution, it is apparent that a member of the legislature serves as a state officer during the term for which elected and not merely during sessions of the legislature.

The representation of his constituents and the state by a member of the legislature is a continuous representation during the life of the office, and does not begin and end with the biennial sessions. There are such necessary considerations as membership on interim committees, audiences with constituents, and the preparation or formulation of legislative proposals during periods when the legislature is not in formal session. The culmination or fruition of his efforts as a member of the legislature is accomplished at the biennial session, at which time, among other things, the legislator introduces legislative proposals which he considers necessary to overcome weaknesses or defects in existing laws which became apparent as a result of his investigations and studies made during the interim.

This opinion does not overlook the fact that in 1954 the state constitution was amended to provide a monthly compensation to members of the legislature in lieu of a per day compensation during biennial sessions. Such was merely a recognition that additional compensation and method of payment was necessary and did not affect the computation of retirement credit for members of the legislature.

In light of the foregoing considerations, it is my opinion that the former member of the legislature referred to in the above question is entitled to credit for each full term served as a member of the legislature.

058-88—March 10, 1958

HIGHWAY CODE—FINANCING

STREETS ADJACENT TO PUBLIC SCHOOLS—EXPENDITURE
OF ROAD FUNDS—§§235.36, 336.02 AND 339.09(1), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. May primary road funds be used for the construction of campus streets at public junior colleges in Florida?
2. May secondary road funds be used for the construction of campus streets at public junior colleges in Florida?
3. Where more than one county participates in the

support of the public junior college, may each participating county share pro rata from its road funds to the costs of campus paving at public junior colleges?

Section 339.09 (1), F. S., provides:

Funds available to the department or any county from any gasoline tax revenues shall not be used for any nonhighway purposes, provided however, that the road department shall construct and maintain roads and parking areas adjacent to and within the grounds of state institutions, farmers' markets and wayside parks or state park roads, upon request of proper authorities and with the approval of the road department. (Emphasis supplied.)

Junior colleges as created by the Florida legislature are not state institutions although they are institutions of higher learning. They are not under the direction of the board of control. They are operated as a part of the county school system under the county board of public instruction. State appropriations to junior colleges are made under the minimum foundation program as a part of the public school system and distribution of funds is made through the local county school board (Ch. 236, F. S.).

Question 1 is therefore answered in the negative since junior colleges are not state institutions and there is no statutory authorization for the expenditure of primary road funds for this purpose.

As for question 2, it is my opinion that secondary road funds may be used by the board of county commissioners for the purpose of paving necessary streets which serve a public purpose in and adjacent to public schools, including junior colleges. This right is discretionary with the county commissioners. (Section 336.02, F. S.; §235.36, F. S.; A. G. O. 057-99 and A. G. O. 055-277.) This question is therefore answered in the affirmative.

With regard to question 3, I know of no statutory authority for a board of county commissioners to use county road funds for road construction in another county. This question is therefore answered in the negative.

058-89—March 11, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
EXPENSE OF OFFICER ATTENDING ASSOCIATION MEETING AS OFFICE EXPENSE**

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May county officers, who are also officers or committeemen of the various county officers associations, charge expenses, incurred in attending the various association meetings and/or association committee meetings, to their respective offices?

The letter of Honorable Frank B. Dowling, county judge, Dade county, accompanying your request reveals that he, as president-elect of the county judges association of Florida will be frequently called to attend meetings of the association and of its various committees. It appears that many of the meetings may be called to gather information, by conducting hearings on

probate matters, mental health conditions, guardianship and licensing, to be used by the county judges association in the preparation of suggested legislation. It is also apparent that many of the meetings may be called for the purpose of exchanging ideas as to more efficient operation of the office of county judge as well as better understanding as to the application of laws with which the county judge's office is primarily concerned.

We are also informed that certain expenses will be incurred in connection with attendance of the Honorable Frank B. Dowling at these meetings. Thus, the question is raised as to whether or not these expenses may be properly charged as an expense of the operation of the county judge's office of Dade county.

Prior Attorney General Opinions 056-178, 056-320 and 056-324, have dealt with similar questions pertaining to this subject matter. As set out in A. G. O. 056-178, the test to be used in determining whether the expense of attending an association meeting may properly be charged as an operational expense of the office of the attending official, is whether a beneficial county purpose was served by the official's attendance at said meeting. The opinion held that whether his attendance served a beneficial county purpose largely depended upon the nature of the meeting and the problems considered or studied. In that opinion we pointed out that:

If the meeting is a mere social function, little, if any, benefit will flow to the county by reason of the attendance of the county officers; other types of meetings may or may not be beneficial, depending on their nature and the problems studied and considered. We do not think that it follows as a matter of law that the attendance of county officers at such meetings is ipso facto beneficial to the county; but before such expenses may be paid from public funds, there must be a showing made by the officer, claiming expenses from public funds, of benefits flowing to the county by reason of his having attended such a meeting.

Since the national association of county and prosecuting attorneys is an organization providing the county and prosecuting attorneys a medium for mutual cooperation in the exchange of helpful ideas and information leading to improvement of law enforcement and more efficient local government, we held annual dues of the national association of county and prosecuting attorneys to be a proper expense, payable from county funds. (A. G. O. 056-320.)

But, as to whether the expense of a county attorney, attending a meeting of the national association of county prosecuting attorneys held without the state, is a proper county expense, we held that the test to be used in making such a determination is whether a benefit was conferred upon the county by the official's attendance at the meeting. (A. G. O. 056-323.)

In keeping with the formula set out in the aforementioned Attorney General Opinions, we point out that the ultimate test, as to whether incurred expenses of attending various meetings of county officers associations are properly expenses of the attending official's office, is whether a beneficial county purpose is served, as distinguished from some other purpose. This determination is one to be made primarily by exercise of sound discretion of the attending official for he, better than any other, is

familiar with the problems and duties considered as they relate to his particular county.

In keeping with the fundamental principle that public officials are presumed to exercise their discretion in a proper manner, it would appear that if a determination is made that a county purpose has been served is questioned as being an improper exercise of the attending official's discretion, the attacking party would be required to show the impropriety of the official's exercise of his discretion.

The comments herein made apply to those officials having funds incorporated in their budget for reimbursement of actual expenses incurred in connection with the operation of their offices, as well as to those officials whose offices are operated on a fee system basis.

Similarly, it is my opinion that county officers who are also officers and/or committeemen of various county officers associations may charge expenses incurred by them in attending association meetings to the operation of their respective offices or to their budgeted expense fund, so long as some beneficial county purpose is served by their attendance at said meetings. A determination as to whether or not their attendance at such meetings served a beneficial county purpose is to be made in accordance with the formula set forth.

In reaching the above conclusion we are not unmindful that the actual expenses of officers of various county officials associations may be paid in whole or in part from funds of other sources. The test above outlined applies in all cases when travel expenses are not paid from other sources but are charged to the county or to the income of the fee officer. It follows that if such expenses are charged to the county or to the income of the office then the only test that can be applied as to the propriety of paying them is the one outlined above unless it is shown that such actual expenses incurred have been paid from other sources.

058-90—March 13, 1958

TAXATION

AD VALOREM—PORTABLE TRAILER PORCHES—

§§192.03, F. S.

To: *Board of County Commissioners, County Courthouse, Fort Lauderdale*

QUESTION:

Should trailer portable porches be included in the valuation of a trailer park as lands for the purpose of ad valorem taxation?

Lands or real estate for the purpose of ad valorem taxation in this state is defined, by §192.03, F. S., as "including lands and all buildings, fixtures and other improvements thereon." Real property for the purposes of taxation has been held to include the land itself, all buildings, structures and other improvements on it of a permanent nature and all rights and privileges belonging to or appertaining to the land (84 C. J. S. 171, 172, 182 and 184, §§67, 72 and 73; 5 Words and Phrases 869-884; 20 Words and Phrases 319-332; and 30 Words and Phrases 220-240). The

portable porches for trailers mentioned in the above question belong to the owners of the trailers and not the owners of the land; they are movable and are intended to be moved with the trailer when and if moved. There is nothing in the record showing that the trailers or the portable porches become, or are intended to become, part and parcel of the real property. They do not seem to have the permanency required to become part and parcel of the realty taxed.

Unless there is clearly apparent an intention of the owner of the real property and of the owner of the portable trailer porches that they are to become part and parcel permanently of the land, the above question should be answered in the negative.

Should it be determined that the portable trailer porches are not a part of the realty and not subject to taxation as a part of the realty, the question of their taxability as tangible personal property may arise. The general rule is that tangible personal property is taxable where it is usually or permanently kept, but not where it is temporarily kept. If usually or permanently kept at a location it is subject to taxation there although it may be temporarily away from that location on the tax day (in this state of January 1) (84 C. J. S. 223-224, §114; 61 C. J. 223-224, §209).

The fact that an item of tangible personal property may be in this state on the tax day would not of that fact alone make it taxable here, nor would its absence on that day defeat the state's right to tax if it has acquired a permanent situs here. Whether an item of tangible personal property has acquired a situs in this state for taxation so as to be subject to taxation is largely a question of fact to be determined by the tax assessor from all the facts and circumstances. In this connection see *Arundel Corp. v. Sproul*, 136 Fla. 167, 186 So. 679, involving the tax situs of a large dredge and other dredging equipment found in this state on the tax day.

058-91—March 13, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY TAX ASSESSORS—OFFICE HOURS—§§193.11, 193.25,
193.29, 119.01; §19, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May the county assessors of taxes in this state fix their office hours so that they will be open to the public for only half of each office day while engaged in the preparation and extension of the tax rolls?

It is general knowledge that the several county assessors of taxes in this state begin the preparation of their tax rolls around April 1 of each year and complete their descriptions and valuations around July 1 when they meet with the board of county commissioners for the purpose of equalizing their valuations, and that from the time of the equalization until around October 1 they are engaged in extending taxes on the tax roll and otherwise completing it (§§193.11, 193.25 and 193.29, F. S.). It, therefore, appears that the bulk of the official duties of the county assessors must be performed between April 1 and October 1; it is during

that time that the greatest pressure of their official duties is on them.

Section 17, Art. XVI, State Const., provides that "no person shall hold any office of trust or profit under the laws of this state without devoting his personal attention to the duties of the same." We find no provision in the state constitution, or in the statutes, specifically fixing the time during each business day the assessor of taxes is required to keep his office open, although §4 of Art. XVI, State Const., requires that "the Clerk and Sheriff shall either reside or have a sworn deputy within two miles of the county seat." We find no similar provision applicable to the county assessor of taxes.

"Constitutional provisions requiring every officer personally to devote his time to the duties of his office mean that he shall devote such of his time thereto as may suffice for the full and faithful discharge of his duties, including all his time, if necessary, and in no way preclude the legislature from providing that his entire time shall be given to the office. . . .

"State officers are under a mandatory duty to keep their offices open for transaction of business during the time prescribed by statutes, but, in the absence of a controlling statute, may themselves prescribe reasonable regulations governing the time during which their offices shall be open. Where an officer keeps his office open beyond the time prescribed by law, it is his duty to receive such business as may be presented to him during that period." (81 C. J. S. 891, §59.)

The supreme court of the state of Washington, in *State v. Hinkle*, 130 Wash. 525, 228 P. 299, text 300, in a proceeding involving the secretary of state of Washington, said: "It can hardly be gainsaid that in the absence of statute the Secretary may fix within reason the hours when his office shall be open for business, otherwise he would be required to keep his office open continuously, which would be unnecessary and unreasonable." This case was cited in *State v. Batchlor*, Wash., 130 P. 2d 72; *Soutar v. St. Clair County Election Commission*, Mich., 54 N. W. 2d 431, and *Daniels v. Cavner*, Ill., 88 N. E. 2d 828, without any criticism of the rule announced as above. This is the only reported case we have been able to find dealing with the specific question.

Although there may be books and records in the office of the county tax assessor that are public records within the purview of §119.01, F. S., available for public inspection; however, the primary purpose of such office is the assessment of property for taxation to raise funds for the operation of the state and county. Furthermore, many of such books and records are available in the office of the clerk of the circuit court and may be in other county offices. In our opinion of Aug. 19, 1957 (057-264) we held that certain books and records in the offices of county tax assessors were public records subject to inspection by the public "so long as such inspection does not hinder the tax assessor in the preparation of his tax roll and extending the taxes." Should there arise a conflict between the duty of the assessor to complete and extend his tax roll and the right of the public to inspection of the records in his office, then the right to inspection must give way to the duty of preparing the tax roll to the extent necessary to insure the completion of the tax

roll within the time required by law.

Strong public policy, recognized for many years requires various county officers to maintain a degree of uniformity in keeping their respective offices open for the conduct of the business of the public. Not unmindful of the right of the citizens of Florida to inspect public records in custody of the tax assessor, I believe this right to inspect may be limited to a degree in deference to the primary function of the tax assessor's office; viz, the assessment of taxes and preparation of the tax roll.

It is my opinion that the tax assessor is required to keep his office open for the conduct of the primary function of that office during the business hours maintained by other offices in his county. The tax assessor may, however, after adequate notice to the general public and approval of the board of county commissioners, properly reflected in their minutes, restrict the right to inspect public records in his office to certain designated periods of the day during periods of the year which require the uninterrupted complete attention of the personnel of his office to the assessment of taxes and preparation of the tax roll.

058-92—March 17, 1958

**COUNTY ORGANIZATION—OFFICERS—REGULATIONS
PUBLIC LIBRARY FACILITIES—CONTRIBUTION OF COUNTY
FUNDS TO MEMORIAL LIBRARY AND MUSEUM ASSO-
CIATION—CH. 150; §§150.01, 150.06 AND 150.08, F. S.**

To: Mack N. Cleveland, County Attorney, Sanford

QUESTION:

May a board of county commissioners contribute county funds to a memorial library and museum association under the provisions of Ch. 150, F. S.?

An examination of Ch. 150, F. S., clearly indicates a legislative intent to provide citizens of the respective counties free public library service. The boards of county commissioners are expressly authorized to create and maintain a free public library or free library service for their counties; to contract with any nonprofit library corporation or association in the county, or with any other county or municipality in the state owning a free public library, for free library service for the citizens of their counties. The board is also authorized to create a library fund, to carry out the purpose of this chapter, by ad valorem taxation or an appropriation from the general fund of the county (§§150.01, 150.06 and 150.08, F. S.).

"Free library service," as used in this chapter means the maintenance of a comprehensive collection of books which may be used by the general public, either within the confines of the building housing this collection of books, or which may be withdrawn for use outside such a building, without charge.

Under the authority of Ch. 150, F. S., the boards of county commissioners may, by contractual arrangement compensate an association which offers the service outlined above to the citizens of the county. The association outlined in your inquiry appears to be something in the nature of a museum as distinguished from a library offering the services herein described.

Although this association is operated on a nonprofit basis

and is owned by a municipality, it is my opinion that the boards of county commissioners are not authorized to disburse county funds to such an association under the provisions of Ch. 150, F. S.

058-93—March 17, 1958

TAXATION

DOCUMENTARY STAMP TAXES—CHANGE IN VALUE OF CORPORATE STOCK BY AMENDMENT OF CHARTER— §§201.04 AND 201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

A Florida corporation, upon organization, pursuant to its charter, issued shares of stock having a par value of \$1; subsequent to the issuance of the said stock, the corporate charter was amended changing the par value of such outstanding stock from \$1 per share to \$25 per share, without the issuance of new shares of stock; is there any additional documentary stamp taxes due?

There has been no sale, agreement to sell, or to transfer any shares or certificates of stock or interest therein by this amendment within the purview of §201.04, F. S.; neither has there been any sale, agreement to sell or transfer of any profits or interest in the property of the corporation by the amendment. So far as we are advised, no additional value has been added to the structure of the corporation, although the transaction may have transferred surplus to the capital account. We, therefore, find no taxable transaction within §201.04, F. S. Under §201.05, F. S., "on each original issue, whether organization or reorganization, of certificates of stock issued in the state, or profits, or of interest in property or accumulations, by any corporation," there is imposed a documentary stamp tax in the amount therein provided.

"In determining whether an issue of stock is an original issue, book entries of the corporation are not decisive. Where, however, an exchange of shares is accompanied by an increase in capital through a transfer of surplus to capital account the transaction is taxable." (47 C. J. S. 786, §547). Under federal tax regulation 113.25, "the issue of stock in a recapitalization or reorganization, where there is no dedication of additional capital, either by transfer of earned surplus or otherwise," is not subject to the federal documentary stamp tax. Capitalization of earned surplus is not considered as a mere reclassification of stock (see Annotation in 170 A. L. R. 691). Prior to the amendment changing the capital structure of the corporation, the capital of the corporation was the number of outstanding shares times \$1, the value of each share; after the amendment, the capital was the number of outstanding shares (which was not changed) times \$25 (the increased value of the stock). This increase in capital structure represents either additional paid in capital or a transfer of surplus to the capital account. In either case the value of the outstanding shares has been changed from \$1 per share to \$25.

It is indicated from the file that a rider has been issued by the corporation to the stockholders evidencing the change in the value of the shares of stock from \$1 to \$25 per share to be

attached to the said stock. This instrument, as well as the certificate of increased value of stock on file with the secretary of state, is certificates of profits or interests in property or accumulations within the purview of §201.05, F. S., and subject to documentary stamp taxes. The certificate aforesaid would seem to have a value of the difference between the original stock and the increased value.

The above stated question is, therefore, answered in the affirmative.

058-94—March 14, 1958

COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—STATE ATTORNEY'S ELIGIBILITY TO PARTICIPATE THEREIN—CH. 650, F. S.; §650.02

(2) (3), F. S. §9b, ART. V, STATE CONST.

To: *Richard E. Gerstein, State Attorney, Miami*

QUESTION:

Does the state attorney of the 11th judicial circuit in and for Dade county serve in a dual capacity as both an officer of the state and the county so as to qualify him as eligible to participate in the social security coverage presently applicable to the officers and employees of Dade county?

Through the authority granted in Ch. 29824, 1955 (Ch. 650, F. S.), the benefits of the federal social security act inured to the officers and employees of Dade county. Employment under such act was defined as meaning "any services performed" by an employee of any political subdivision of the state (§650.02(2), F. S.). The term "employee" was defined as including an officer of a political subdivision (§650.02(3), F. S.).

As formerly existed, the office of county solicitor of Dade county was a county office (§47, Art. V, State Const.). In 1956 an amendment was added to the Florida constitution which, effective January 1957, abolished the office of county solicitor of Dade county and transferred all of the duties and functions of such office, together with the appropriations therefor, to "the State Attorney of the Eleventh Judicial Circuit in and for Dade County . . ." (§9b, Art. V, State Const.).

In light of the foregoing language, it is evident that the state attorney of the 11th judicial circuit serves in the dual capacity as a state and county officer. Inasmuch as the former office of county solicitor of Dade county was eligible to participate in the county retirement system, and inasmuch as the functions and duties of such office were made a part of the functions and duties of the office of state attorney, it is my opinion that the benefits of such office also transferred and that the state attorney is eligible to participate in any retirement program available to other officers and employees of Dade county.

Your question is answered accordingly.

058-95—March 18, 1958

TAXATION

LICENSING A BUSINESS WITHIN A ZONED AREA NOT INCLUDING SUCH BUSINESS—CH. 205; §§205.01, 205.14, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should an occupational license be required of a person, firm or corporation doing business within an area zoned against such business?

We are here dealing with an occupational license under the provisions of Ch. 205, F. S., which is primarily a revenue producing measure and not a regulatory measure designed primarily to regulate a business. For the purposes of the above question, we shall presume, but do not here decide the question, that a business is being conducted within an area zoned against such business so that the business violates the zoning ordinance. We repeat, we are merely presuming the violation of the zoning ordinance and do not hold as a matter of fact or of law that the zoning ordinance is actually being violated.

Under §205.01, F. S., "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter (Ch. 205, F. S.), or other law of this state, unless a state license, or state and county license, or county license, as the case may be, shall have been procured" under said Ch. 205. We find nothing in this chapter exempting one operating a business in violation of other laws from the operation of Ch. 205, F. S., if otherwise within the purview of said chapter. An occupational license tax may be imposed upon an illegally conducted business, "since the payment of the tax is no justification for doing the forbidden act. Furthermore, the fact that the owner of a business has neglected or refused to obtain a required authorization for the conduct of his business will not preclude the collection of a license tax imposed on such business" (53 C. J. S. 557, §28).

Judge Cooley, in his work on taxation, states that "it is no defense to an action to collect a privilege tax that the business upon which the tax is assessed is illegal" (4 Cooley on Taxation, 4th Ed. §1689). See also *Casmus v. Lee*, 236 Ala. 396, 183 So. 185, 118 A. L. R. 822 and cases and authorities therein cited. Although a business may be granted an occupational license, such license does not permit the violation of any regulatory law or criminal statute (see §205.14, F. S.).

Although a person may be operating a business, profession or occupation in violation of a zoning law, he is nonetheless liable for the payment of an occupational license for the operation for that business. The issuance of an occupational license to a person to carry on an occupation, profession or business does not authorize the conduct or operation of such occupation, profession or business in violation of a positive law. It is, therefore, not necessary that we determine whether a particular business may be carried on within a zoned area legally, as it is not material under the license statutes whether it be legally conducted or not, if carried on a license tax is due regardless of its lawfulness; unless there be an express prohibition against the

issuance of a license.

We, therefore, answer the above question in the affirmative; however, with the warning that such a license will not legalize the conduct of a business in a prohibited area.

058-96—March 19, 1958

CRIMINAL PROCEDURE

SEARCHES—AUTHORITY OF WILDLIFE OFFICER OF GAME AND FRESH WATER FISH COMMISSION— PROPOSED INSPECTION RULE—§§372.83 AND 775.07, F. S.; §30, ART. IV, §22, D. R., STATE CONST.

To: A. D. Aldrich, Director, Game and Fresh Water Fish Commission, Tallahassee

QUESTIONS:

1. Does a wildlife officer of the game and fresh water fish commission have the authority to search a person or vehicle on a public road in a wildlife management area, as a routine matter and not in connection with a suspected violation of the rules of the commission?

2. Does a wildlife officer of the game and fresh water fish commission have the authority to search a person or vehicle in a wildlife management area but not on a public road, as a routine matter and not in connection with a suspected violation of the rules of the commission?

Section 30, Art. IV, State Const., vests in the game and fresh water fish commission the power and authority to acquire, establish, control and manage hatcheries, sanctuaries, refuges and reservations for the management, restoration, conservation and regulation of the birds, game, fur bearing animals and fresh water fish of the state.

Pursuant to this constitutional authorization the commission has adopted certain rules concerning wildlife management areas, which rules are incorporated in the "Wildlife Code."

Rule 3 defines "wildlife management area" as an area set aside for the management of wildlife and/or fresh water fish, on which hunting or fishing may be permitted only at such times and under such regulations as specifically provided for each individual area.

Rule 7 authorizes the Commission to establish wildlife management areas, and to prohibit hunting, trapping and/or fishing within such areas except under management.

Rule 8.02 lays down regulations relating to wildlife management areas, among them being the requirement of Subsection 2 that hunters must check in and out of designated checking stations when entering or leaving such areas where checking stations are maintained; the provisions of Subsection 4 that guns are allowed only during the open season designated for each particular area except under special permit, that hunters may have but one gun plus a sidearm in their possession while actually hunting on such areas except under special regulations for a particular hunt, and that possession of loaded guns on days when hunting is not permitted and after shooting hours is prohibited; and the provision of Subsection 11 that any vehicle or other transportation device may be searched while in, leaving, or entering a wildlife management area.

AS TO QUESTION 1:

Section 22 of the Declaration of Rights of the Constitution of the State of Florida provides that *the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.*

It is my opinion that people have the right to freely travel public roads without molestation from those who would search their vehicles as a matter of routine, even though the public roads they travel run through wildlife management areas; and that a routine search by a wildlife officer of a vehicle on a public road in a wildlife management area, which is not made under a valid search warrant or as an incident to a lawful arrest or upon probable cause or by consent, is an unreasonable search and is in violation of the basic right secured to the people by said Section 22 of the Declaration of Rights, despite the broad search provisions of Subsection 11 of Rule 8.02 to which reference has hereinabove been made.

Where the search of a vehicle is not made under a valid search warrant or as an incident to a valid arrest or by the consent of the person in possession of the vehicle, the only way that I know of for a wildlife officer to make a valid search of such vehicle on a public road, inside a wildlife management area, is upon probable cause. In order for a wildlife officer to have probable cause for searching a vehicle on a public road, he must know or have trustworthy information of such facts and circumstances as are sufficient to warrant a reasonable belief that the vehicle is carrying illegally taken wildlife or fish or is carrying contraband or illegal articles in violation of Wildlife Code. When the wildlife officer has such knowledge or trustworthy information, I think that he has the right to search the vehicle (See *Longo v. State*, 26 So. 2d 818; *Kersey v. State*, 58 So. 2d 155; and *Collins v. State*, 65 So. 2d 61).

Incidentally, in *Collins v. State*, supra, the Supreme Court of Florida quoted approvingly from the opinion of the United States Supreme Court in *Carroll v. United States*, 267 U. S. 132, as follows:

To use the words of Mr. Chief Justice Taft in *Carroll v. United States*, infra [267 U. S. 132, 45 S. Ct. 285]:

"... those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

As to the search of a person on a public road in a wildlife management area, the law appears to be that in order for a search of a person to be valid it must be made under a valid search warrant, or as an incident to a lawful arrest, or on invitation or consent (79 C. J. S. 831, Searches and Seizures, Section 66-b).

Therefore, it is my opinion that your first question is properly answered in the negative.

AS TO QUESTION 2:

It is my opinion that a wildlife officer has the same, but no greater, right to search a person or vehicle in a wildlife management area, but not on a public road, as he has to search such person or vehicle on a public road in such management area.

In other words, I think that a vehicle off of a public road in a management area may lawfully be searched by a wildlife officer only

under a valid search warrant, or as an incident to a lawful arrest of the person in possession thereof, or by consent, or upon probable cause; and that a person off of a public road in such an area may lawfully be searched by a wildlife officer only under a valid search warrant, or as an incident to a valid arrest of such person, or by consent.

Therefore, I am of the opinion that your second question is properly answered in the negative.

I suggest that the Commission might wish to consider the adoption of an inspection rule modeled after a Tennessee statute, for the purpose of authorizing wildlife officers to ascertain whether the provisions of the Commission's rules are being faithfully complied with. The Tennessee statute referred to provided as follows:

Sec. 5. Be it further enacted, That the Game and Fish Director or the conservation officers shall enforce all laws now enacted or that may hereafter be enacted for the propagation and preservation of all wildlife in this State, and shall prosecute all persons, firms and corporations who shall violate any of such laws, and he himself or his conservation officers shall seize any and all wild animals, wild fowls, wild birds, fishes, frogs and other aquatic animal life, or parts thereof, that have been killed, caught, or taken at a time, in a manner or for a purpose, or which are in possession, or that have been shipped, transported, carried or taken in this state or brought into this state from another state contrary to the laws of this state. Provided, further, *it is hereby made the duty of every person participating in the privileges of taking or possessing such wildlife as permitted by this Act to permit the Game and Fish Director or his conservation officers to ascertain whether the requirements of this Act are being faithfully complied with, including the possession of a proper license.* Any person who shall refuse such inspection and count by any authorized officer of the State, or who shall interfere with such officer or obstruct such inspection or count shall be guilty of a *misdemeanor*, and upon conviction be punished by a fine of not less than twenty-five (\$25.00) nor more than fifty dollars (\$50.00). (Emphasis supplied.)

Said statute was upheld by the Supreme Court of Tennessee in *Monroe v. State* (Tenn.), 253 S. W. 2d 734. Similar statutes were upheld by the Supreme Court of Tennessee in *State v. Hall* (Tenn.), 51 S. W. 2d 851 and *Hughes v. State* (Tenn.), 259 S. W. 2d 527, and by the Supreme Court of Missouri in *State v. Bennett* (Mo.), 288 S. W. 50, and by a Pennsylvania court of intermediate jurisdiction in *Commonwealth v. Butler* (Penn.), 40 Pa. Dist. & Co. R. 358, although the Supreme Court of Michigan reached a contrary conclusion in *People v. Younger* (Mich.), 42 N. W. 2d 120, with three out of the eight Michigan justices who participated in the decision dissenting because they thought the Michigan statute valid.

If the Commission should adopt a rule modeled after the above quoted Tennessee statute, the provision making a violation thereof a misdemeanor and prescribing the punishment should be omitted, since it is for the legislature to enact laws concerning such matters and since §372.83, F. S., makes it a misdemeanor to violate a rule of the commission and §775.07, F. S., prescribes the penalties for committing such misdemeanor.

058-97—March 19, 1958

ELECTORS AND ELECTIONS

POLITICAL PARTY EXECUTIVE COMMITTEES—PROHIBITION AGAINST DISTRIBUTION OF CAMPAIGN LITERATURE NEAR POLLS—§§103.111(2) AND 104.36, F. S.

To: James L. Graham, Jr. Attorney, Tallahassee

QUESTIONS:

1. Assuming that the additional precinct committeemen and committeewomen authorized by §103.111, F. S., are authorized with respect to certain large precincts and the county executive committee appoints such additional members, will it be necessary that these additional memberships on the committee be filled by election in 1958 and every four years thereafter, or will it be proper for them to be filled by the county executive committee as the terms of the incumbents expire?

2. Is it proper for signs or banners advertising the candidacies of persons for public office to be displayed within 100 yards of a polling place on election day, or does §104.36, F. S., prohibit this as well as the solicitation of votes within such area?

AS TO QUESTION 1:

Section 103.111(2), F. S., provides in part:

The county executive committee of each political party shall consist of two members, a man and a woman, from each precinct within the county, *who shall be elected* for four years at the second primary held in the year 1958, and every four years thereafter; provided that in precincts having an official registration of more than one thousand qualified electors an additional two members, a man and a woman, shall be authorized *and their membership provided for as in other precincts.* (Emphasis supplied.)

Inasmuch as the executive committeemen and committeewomen in all precincts are *elected* unless appointed to fill vacancies, it would appear that the additional two members should be *elected* unless appointed to fill a vacancy. This appears consistent with a previous holding in A. G. O. 055-241, 1955 Biennial Report of the Attorney General, p. 318, wherein I said with respect to the section of the election code under discussion, "... the two additional members shall be *elected* in those precincts falling within the terms of the proviso." (Emphasis supplied.)

AS TO QUESTION 2:

Section 104.36, F. S., provides in part:

104.36 *Distribution of literature, etc. near polling places.*

—On the day of any election it shall be unlawful for any person to distribute any political pamphlets, cards or literature of any kind, or solicit votes, or approach any elector in an attempt to solicit votes within 100 yards of any polling place.

In dealing with a similar question on this subject, I pointed out in A. G. O. 051-432 that, "... it is well to note that in the construction of legislation enacted under the police power of a state, an example of which is the election code of 1951, the intent of the legislature is to protect the public welfare from the infringe-

ment of the evil which the enactment is designed to control." Applying this construction to the instant question it appears to me that signs and banners carrying a candidate's name and information relative to him are a form of campaign literature and furthermore constitute a "silent solicitation" of votes.

Therefore, in my opinion said signs and banners come within the provisions of §104.36, F. S., and should not be displayed within 100 yards of a polling place on election day.

058-98—March 19, 1958

**COUNTY ORGANIZATION; OFFICERS AND REGULATIONS
SHERIFF OF MARTIN COUNTY—ACCOUNTS—CHS. 57-1074
AND 57-368**

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

1. Chapter 57-1074, effective June 29, 1957, provided an annual salary of \$8,000, payable in 12 equal monthly installments to the sheriff of Martin county. From what date was the salary payable?

2. Chapter 57-368, became effective Oct. 1, 1957. If the date of the sheriff's salary was effective prior to Oct. 1, 1957, from what fund was it payable?

3. If the salary was payable by the board of county commissioners, what disposition should be made of the net income of the sheriff's office during the period?

4. Was Ch. 57-1074 superseded on Oct. 1, 1957 by Ch. 57-368?

It is assumed for the purpose of this discussion that all acts herein referred to are in all respects constitutional as it is the established policy of this office not to pass upon the constitutionality of any statute.

AS TO QUESTION 1:

Chapter 57-1074, which became effective June 29, 1957, provides:

In all counties having a population of not less than 7,500 nor more than 7,900 inhabitants according to the last official state-wide census, the sheriff shall receive a salary of \$8,000 per annum, to be paid in 12 equal monthly installments.

Prior to the enactment of Ch. 57-1074, the sheriff received compensation not to exceed \$7,500 per annum under the provisions of Ch. 145, F. S.

After the effective date of Ch. 57-1074, and prior to the effective date of the sheriff's budget act, Ch. 57-368, the sheriff of Martin county remained a fee officer. Chapter 57-1074 contains no provisions for changing this status, in fact, the act does not provide a fund from which to pay a salary nor does it dispose of the income of the sheriff's office. The sheriff was not to receive a salary by this local act as well as compensation as a fee officer under Ch. 145. The intent of the legislature, therefore, was to increase the maximum compensation to be received under Ch. 145, F. S.

In opinion 058-57, dated Feb. 18, 1958, I held, when the

maximum compensation of a fee officer is changed by a law that provides a certain amount as the maximum amount that may be retained by such officer from the income of his office as compensation, and the law does not specify a date upon which the change is effective, it becomes effective on January 1 of the year in which it was enacted. In that opinion I distinguished a fee officer from an officer on a fixed salary and assumed that the act made no attempt to break the salary down into monthly increments. There is a distinction between a legislative act which only provides the maximum annual compensation for fee officers and one which provides the compensation plus a provision for monthly payments. When the legislature provides for equal monthly payments as it did in Ch. 57-1074, I do not believe the increased compensation begins until the effective date of the act. The provisions of Ch. 57-1074 became effective June 29, 1957, and increased the sheriff's compensation from that date until the effective date of Ch. 57-368, which was Oct. 1, 1957.

Question 1 is answered accordingly.

AS TO QUESTION 2:

This question has been answered by question 1 in that the provisions of Ch. 57-1074 increased the maximum compensation under Ch. 145, F. S., rather than establishing a fixed salary.

AS TO QUESTION 3:

Since the amount provided by Ch. 57-1074 is merely an increase in the maximum compensation of a fee officer, this amount will be paid from the net income of the office and any balance goes into the general fund of the county.

AS TO QUESTION 4:

Chapter 57-1074 was passed by the house May 29, 1957, by the senate May 30, 1957, and was filed with the secretary of state June 29, 1957. Chapter 57-368 passed the house May 3, 1957, passed the senate June 5, 1957, and was filed with the secretary of state June 19, 1957.

The legislature in enacting a statute is presumed to act with full knowledge of all statutes pertaining to the same subject matter (*Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305). Therefore, where two acts passed in the same legislative session are irreconcilable, the one which is the later expression of the legislature will ordinarily prevail over and impliedly repeals the other (82 C. J. S. 297).

In opinion 055-181, dated Aug. 3, 1955, (AGO 1955-1956, p. 239) we dealt with a similar question. There we upheld the act which was the last to pass the legislature despite the fact that this was not the last to be filed with the secretary of state.

Further, Ch. 57-368, provides: ". . . all local, special and general laws of local application and general laws inconsistent with this act are repealed and the salaries set by this general act are to be the salaries of these sheriffs . . ." This repeal provision covers Ch. 57-1074, which is inconsistent with the salary provision of 57-368.

It is my opinion that where a conflict exists between the two laws, Ch. 57-368, which is the later expression of the legislature will prevail and should be followed.

Question 4 is answered in the affirmative.

058-99—March 19, 1958

EDUCATION

STATE BOARD OF CONTROL—IMMUNITY FROM PUBLIC LIABILITY WHEN ACTING FOR AND ON BEHALF OF UNIVERSITY OF FLORIDA—§§240.03, 240.04, 240.11, F. S.; §4, ART. IX AND §11, ART. XVI, STATE CONST.

To: J. B. Culpepper, Executive Director, Board of Control, Tallahassee

QUESTIONS:

I have your request for an opinion as to the immunity of the state board of control acting for and on behalf of the university of Florida from public liability.

The following specific points are raised:

1. The nature and extent of any such immunity;
2. Whether or not employees of the university of Florida, when engaged in their duties, are immune from public liability under any provision of state or federal law, and, if so, the nature and extent of such immunity;
3. Whether or not the university has authority to waive such immunity;
4. Whether or not the university has authority to purchase liability insurance.

AS TO QUESTION 1:

The university of Florida is under the complete management and control of the state board of control (§240.04, F. S.). The board of control is a state agency acting under the supervision of the state board of education and is a body corporate (§§240.03 and 240.11, F. S.).

Suits against the state are barred by the immunity of the sovereign unless specifically authorized by statute.

Section 22, Art. III, State Const., provides:

Suits against state.—Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating.

Section 4, Art. IX, State Const., provides:

Money drawn from treasury.—No money shall be drawn from the Treasury except in pursuance of appropriations made by law.

Section 11, Art. XVI, State Const., provides:

Extra compensation claims.—No extra compensation shall be made to any officer, agent, employe, or contractor after the service shall have been rendered, or the contract made; nor shall any money be appropriated or paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, unless such compensation or claim be allowed by bill passed by two thirds of the members elected to each house of the Legislature.

There is no Florida statute which waives the immunity of the board of control as a state agency. The Florida supreme court has recognized the immunity of state agencies (*Weir v. Palm Beach County and the State Road Dept.*, 85 So. 2d 865).

AS TO QUESTION 2:

The doctrine of sovereign immunity would be of little consequence if state officers and employees were subject to suit for their actions taken within their statutory authority. Florida Juris-

prudence, Administrative Law, §236. "It has been held that when an administrative officer acts within the scope of his jurisdiction or authority he is not responsible unless he acts from a corrupt motive, even though he misconstrues the law and acts erroneously."

The rule is well established in federal cases. "The purpose of the rule which exempts public officers from the harassment of private suits for damages on account of the performance of their public duties, is, secondarily, for their protection, in order that its primary objective may be secured, i.e., a fearless administration of the law" (Booth v. Fletcher, 101 Fed. 2d 676).

"When the act done occurs in the course of the official duty of the person duly appointed and required to act it is the official action of the department; and the same reason for the immunity applies as if it had been performed by the superior officer himself" (Cooper v. O'Connor, 99 Fed. 2d 135).

AS TO QUESTION 3:

The board of control does not have authority to waive immunity in the absence of statutory authority (see constitutional provisions referred to above).

AS TO QUESTION 4:

The board of control does not have authority to purchase liability insurance without specific statutory authority (which it does not have) since such expenditure would be in conflict with §4, Art. IX, State Const., quoted above.

058-100—March 20, 1958

ELECTORS AND ELECTIONS

FREEHOLDER REGISTRATION; ESTABLISHMENT OF
FREEHOLDER STATUS FOR ABSENTEE VOTERS—
§§97.081(5), 98.011, 100.221, 100.231 AND 100.251, F. S.

To: James L. Graham, Jr. Attorney, State Ass'n Supervisors of
Registration, Tallahassee

QUESTIONS:

1. In the light of *Holmer v. State, Fla.*, 28 So. 2d 586, should a supervisor of registration permit freeholder registration and reregistration during the 14 days prior to a freeholder election when said registration books are closed?

2. May a registered elector who did not reregister during a called reregistration of freeholders but who is eligible to vote an absentee ballot be allowed to show his freeholder status by enclosing an affidavit evidencing that he is a freeholder when he mails his absentee ballot and thus be allowed to vote in the bond election?

AS TO QUESTION 1:

Sections of the election code contained in the Florida Statutes applicable to the instant situation are set out as follows:

Section 97.081 (5): "The registration books shall be kept open for at least thirty days and closed at least fourteen days prior to the holding of any bond election at which time a certified number of registered freeholders shall be available, as provided by law." (Emphasis supplied.)

Section 100.231: "The registration books shall close not later than fourteen days prior to the date of holding

any bond election unless such bond election shall be held on the day of another election as prescribed in §100.261 in which case the registration books shall close as prescribed for such other election." (Emphasis supplied.)

Section 100.221: "*The laws governing the holding of general elections are applicable to bond elections except as provided in §§100.201-100.351.*" (Emphasis supplied.)

Section 100.251: "Qualification and registration of electors participating in any bond election are the same as prescribed for voting in elections under the general election laws. . . ."

Section 98.011, in part states: "No person shall register at any time other than during the period provided for the registration of electors."

Sections 97.081 and 100.231, F. S., require that the registration books *shall* close at least 14 days prior to a bond election. Sections 100.221 and 100.251, F. S., are interpreted to mean that the procedures for regular registration are generally applicable to freeholder registration and reregistration. Section 98.011, F. S., pertaining to general registration says that, "No person *shall* register at any time other than during the period provided for registration of electors." The meaning of this sentence is plain, obvious and mandatory. Summing up the above quoted sections of the election code, it appears that it was the intent of the legislature that the registration books be closed for at least 14 days prior to a bond election and there should be no registration during that period.

In *Holmer v. State*, 158 Fla. 397, 28 So. 2d 586, at p. 588, the court said, "During the interim between the closing of the registration books and the bond election, the supervisor of registration may . . . add to the list . . . the names of those who qualified as freeholders after the books were closed, or who for other reasons have become qualified to vote in the election." It is conceded that the above quoted language of the Florida supreme court may be subject to a different construction than that placed on the statutes by this opinion and while the language of the court is always regarded as persuasive, this particular statement is not considered controlling although I agree with the conclusion reached by the court in that opinion. It is to be noted that the above quoted statement by the court is not supported by statutory or case law. At the time of the decision in the *Holmer* case, Jan. 10, 1947, there was no provision similar to the present §100.241 (2) (d), F. S. This section was not enacted until 1951 when the present election code was adopted. Had there been such a provision permitting registration on election day, it is doubtful that the court would have made the above quoted remark taken from the *Holmer* case. For the same reason the comments relative to registration when the books are closed found in A. G. O. 049-124, 1949 Biennial Report of the Attorney General, p. 149, are amended to come into conformity with this opinion. The last line of opinion 053-260, 1953 Biennial Report of the Attorney General, p. 101, is not considered applicable in the instant case as a special act relative to a single county was under consideration at that time.

It would appear that little effect would be given to the provisions of the law requiring the registration books to close and prohibiting registration except during the time provided

therefor if certain electors were allowed to register and reregister during the period when the books are required by law to be closed. I find no authority in the election code providing for registration during the time when the registration books are required by law to be closed. In 1884, the Florida supreme court held in *State v. Sumter County Commissioners*, 20 Fla. 859, that a registration of voters made at a time, or in another manner, than that prescribed by statute, is not a legal registration. It appears that this well established precedent is still in effect. Consideration has been given to the rights and privileges of the elector and in view of the provisions of §100.241 (2) (d), F. S., permitting reregistration on election day, it cannot be seen where those rights and privileges have been infringed upon by this holding.

Based upon the discussion above, question 1 is answered in the negative.

AS TO QUESTION 2:

It is my opinion that absentee voters should have the same rights and privileges as other electors. Since §100.241 (2) (d), F. S., allows other electors to file an affidavit of ownership of property at the polls on election day in freeholder elections and thereby establish their freeholder status, I believe that the absentee electors should have the same privilege. It is suggested that the affidavit of ownership of property be placed in the outside envelope with *but not in* the envelope containing the ballot. In this way, the freeholder requirement could be established when the outside envelope was opened and the secrecy of the absentee ballot could still be maintained. In view of the plain wording of §100.241 (2) (d), F. S., it appears to me that no other equitable conclusion could be reached.

Therefore, question 2 as set out above is answered in the affirmative.

058-101—March 20, 1958

PUBLIC WELFARE

ILLEGITIMATE CHILDREN—LEGAL OBLIGATION OF MOTHER FOR MAINTENANCE AND SUPPORT

To: *Frank M. Craft, Acting State Director, Department of Public Welfare, Jacksonville*

QUESTION:

Is the mother of an illegitimate child under a legal obligation to provide for the maintenance and support of this child?

Although it has been said that the common law placed no legal obligation on the mother of an illegitimate child to provide for its support, this doctrine has been subjected to some question (10 C. J. S., *Bastards*, §18; 7 Am. Jur., *Bastards*, §71). In *State v. Nestaval* (Minn.), 75 N.W. 725, the Minnesota supreme court concluded that at common law the mother had a right to the custody and control of her illegitimate child and, until the child reached an age where it could choose between its parents, the legal obligation of supporting the child rested upon the mother (See also *Humphrys v. Polak* (1901) 2 King's Bench 385).

Florida has no statute requiring the mother of an illegitimate child to provide for its support. Moreover, an examination of the

decisions of the supreme court of Florida fails to reveal any holding on point. However, the courts of last resort of other jurisdictions have discussed and decided this same or similar issues. Whatever may have been the common law rule, a perusal of these decisions reveals clearly that in this country, according to the weight of authority, the mother of an illegitimate child has a legal obligation to provide for the support of such child.

It is generally agreed that as an incident of her right to the custody and control of her illegitimate children, the mother has the duty to provide for such children's maintenance and care (*In re Hawthorne v. Pennsylvania*, 21 A. 2d 521; *State v. White (Mo.)*, 248 S.W. 2d 841). This right to the child's custody stems from the mother's position as the natural guardian of her illegitimate issue (see 7 Am. Jur., Bastards, §61; §744.11, F. S.). In *Marshall v. Reams*, 32 Fla. 499, 14 So. 95, the supreme court recognized that the mother has a superior legal right over all others to the custody and control of her minor children. It is only natural that coupled with this right to custody is the primary obligation to support the child.

However, since the duty to support her child stems from her right to custody, the mother cannot be held responsible for her illegitimate child's support when she does not have legal custody of such child.

I do not believe that our court would feel compelled to adopt a common law rule that would be unadapted to the conditions and unsuited to the needs of the people of this state. There can be no doubt that the archaic rule absolving the mother of any duty toward her illegitimate child is essentially unsound in the light of the modern viewpoint concerning the recognized relationship existing between a mother and her illegitimate children (§§744.11 and 731.29, F. S.). In support of this, I refer you to *Waller v. First Savings & Trust Co.*, 103 Fla. 1025, 138 So. 780, wherein the supreme court stated at p. 784:

This court has expressly recognized the principle that in specific instances certain rules which were admittedly a part of the old English common law, did not become a part of Florida common law, because contrary to our customs, institutions, or intendments of our statutes on other subjects.

Subject to the above condition, your question is therefore answered in the affirmative.

058-102—March 20, 1958

TAXATION

DOCUMENTARY STAMP TAXES—CORPORATE STOCK—
ORIGINAL ISSUE—PLACE OF ISSUE—CH. 201;
§§201.05, 608.09, 608.10, 608.39, 608.41, 608.42, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where an original issue of corporate stock is made by a Florida corporation in another state, where stock books and transfer records are maintained, is such stock subject to documentary stamp taxes under Ch. 201, F. S.?

Chapter 201, F. S., imposes a documentary stamp tax "on each original issue, whether organization or reorganization, of certi-

cates of stock issued in the state . . . by any corporation," at the rate of 10¢ per \$100 of par value, or 10¢ per share of no par value stock having an actual value of \$100 or less with an increase of taxes where the actual value exceeds \$100 (§201.05, F. S.).

A domestic corporation is an artificial person whose residence or domicile is within the territorial jurisdiction of the state creating it, which residence cannot be changed temporarily or permanently by the migration of its officers or agents to other jurisdictions. So long as it is an existing corporation, its residence, citizenship, domicile or place of abode is within the state which created it. It cannot reside or have its domicile elsewhere; neither can it in contemplation of law be absent from the state of its creation (*Fowler v. Chillingworth*, 94 Fla. 1, 113 So. 667, text 669). While under common law and the statutes of most, if not all, of the states, "it is also well settled that a corporation created under the laws of one state cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly functions in its organization" (*Duke v. Taylor*, 37 Fla. 64, 19 So. 172, text 175). "It is generally held that a strictly corporate action, involving the internal affairs of the corporation, as distinguished from an action by its corporate agents, in behalf of the corporation cannot be legally taken beyond the limits of the state of the corporation's domicile," unless authorized by the statutes of the state of incorporation (18 C. J. S. 589, §178). It is a general rule that courts of foreign states will refuse to enforce the internal affairs of a foreign corporation, although the corporation may be licensed to transact business in that state (Anno. in 18 A. L. R. 1383-1406; 89 A. L. R. 736-747; and 155 A. L. R. 1231, et seq.). In this connection the original issuance of corporate stock has been classified as a strictly corporate function or internal affair of the corporation (Anno. in 18 A. L. R. 1396-1397; 89 A. L. R. 740-741; and 155 A. L. R. 1242).

Although corporations of one state may transact a general business in another state and maintain a main office in such other state "it must, according to a number of decisions, keep its principal place of business, its books and records, and its principal offices in the incorporating state to the extent necessary to the fullest jurisdiction and visitatorial powers of such state and its courts and the efficient exercise thereof in all proper cases" (23 Am. Jur. 30, §17). The situs of shares of stock, as distinguished from the certificate itself, has often been held to be in the state of the domicile of the corporation (13 Am. Jur. 300, §174; 23 Am. Jur. 442, §451). Under §608.42, F. S., the stock of a Florida corporation "shall be transferable on the books of the corporation in the manner and under such regulations as may be provided in the by-laws No transfers of stock shall be valid against the corporation . . . until it shall have been registered upon the corporation's books . . ." (§608.42, F. S.). Although, under §608.39, F. S., stock books and transfer records may be kept in the office of the corporation or in the office of its transfer agent, and under §608.41, certificates of stock may be signed by the officers of the corporation or by its transfer agents, we find nothing in the statutes defining a transfer of stock as including an original issuance of stock; neither do we find any clear authority for the original issuance of corporate stock by a mere transfer agent. Where stock books and transfer records are kept in other states "the corporation shall keep at its office in this state

copies of the stock lists prepared from its stock books and sent to it from time to time by said transfer agent" (§608.39, F. S.). Although stockholders and directors may hold meetings within or without the state (§§608.09 and 608.10, F. S.), we find no statute expressly authorizing the transaction of strictly corporate functions and internal affairs at such meetings beyond the state. *State v. Gay*, Fla., 90 So. 2d 132, involved no internal functions of the corporation, but a business function of the corporation (the issuance of bonds); here an internal function of the corporation is involved (the original issuance of corporate stock).

It may be that the issuance of stock through or at meetings held in other states is only ultra vires and not void; however, we feel that until such transaction is recorded in the records of the corporation maintained in this state it is not binding upon the corporation and the others mentioned in §608.42, F. S. The record in this state is necessary to complete the transaction. An original issue of stock is not a transfer within the purview of §§608.39, 608.41 and 608.42, F. S., and may not be made by transfer agents. Stock may be transferred in another state, but may be issued only when a record thereof is made in this state. We feel that the case is within *Gay v. Inter-County Tel. and Tel. Co.*, Fla., 60 So. 2d 22, instead of *State v. Gay*, 90 So. 2d 132.

The above question is, therefore, answered in the affirmative. This opinion is distinguished from our opinion of Feb. 28, 1958 (058-75) which involved transfers of stock, while original issues of stock is here involved.

058-103—March 21, 1958

PUBLIC LANDS AND PROPERTY

BULKHEAD LAW—SARASOTA COUNTY—TRUSTEES OF
INTERNAL IMPROVEMENT FUND—CH. 57-1853;
§253.122, F. S.

To: *Donald C. McClelland, Jr., County Attorney, Sarasota*
QUESTIONS:

1. Section 253.122, F. S., requires 30 days notice prior to hearings on bulkhead establishment. Must all three publications be 30 days prior to such hearing?

2. In light of Sarasota county special act, Ch. 57-1853, to what extent should Ch. 57-362 be operative in the county?

3. Is the local authority authorized to issue fill permits without the approval of the trustees?

4. If the authority establishes a bulkhead line, must a subsequent desired fill still comply with the requirement for a fill permit, and if so, must the authority permit a fill to the bulkhead line established, and, must this permit be approved by the trustees even though the bulkhead line has been approved?

5. If Longboat Key, which is partially in Sarasota county and partially in Manatee county establishes a bulkhead line, must applications for fill still be approved by the authority?

AS TO QUESTION 1:

Prior to the enactment of Ch. 57-362, §253.13, F. S., provided

that the trustees of the internal improvement fund could sell submerged lands granted by §253.12, F. S., after giving notice by publication in a newspaper published in the county where the lands were located, not less than once a week for four consecutive weeks, and if no objections were filed within *said 30 days* the sale could be consummated.

The pertinent part of §253.122, F. S., provides that bulkhead lines may be fixed "after public hearing of which at least 30 days prior notice has been given by publication of such hearing for three consecutive weeks in a newspaper having general circulation in the county." It will be noted that §253.13, F. S., prior to 1957 required four weeks notice which was to be published within a 30-day period. While this notice was for sale of submerged lands it seems that the same 30-day period should apply under the bulkhead provisions and that only the first publication need be 30 days prior to the hearing. "The usual rule is that, when the law requires a notice to be published for a certain number of weeks or days before legal proceedings are had it is sufficient if the last insertion of the notice shall occur before such proceedings are had" (66 C. J. S., Notice, §18, p. 667; *State v. Blair* 245 Mo. 680, 154 S.W. 148). The purpose of the publication requirement in the bulkhead act is to forewarn interested parties of the scheduled hearing and to afford them an opportunity to be heard. The notice should give interested parties adequate time to prepare for the hearing, but it should not be so remote as to be a useless act.

I do not believe that it was the legislative intent to require all publications 30 days prior to the hearing. It is only necessary that the first publication be at least 30 days prior to such hearing.

Question 1 is answered in the negative.

AS TO QUESTION 2:

Chapter 57-1853, created the Sarasota county water and navigation control authority whose function was to regulate and control submerged lands, islands, sandbars, swamp and overflow lands and other sovereignty lands in Sarasota county, outside the corporate limits of Sarasota. The legislature in the same session enacted Ch. 57-362 (the Bulkhead act), which provides a uniform method for both fixing bulkhead lines and regulating fill operations throughout the state. The Bulkhead act provides in part:

In any county where the legislature by special law or general law with local application has heretofore or hereafter transferred or delegated to any county board or agency other than the board of county commissioners or the governing body of any municipality powers and duties over the establishment of bulkhead line or lines, dredging permits, fill permits, sea wall construction or any other powers of a like nature such agency shall have jurisdiction under this act in lieu of the board of county commissioners or the governing body of any municipality as the case may be.

Statutes passed at the same session of the legislature will be considered in *pari materia* and will be construed so that each will be effective if that is possible (*Provident Life & Accident Ins. Co. of Chattanooga, Tenn. v. Mathers*, 157 Fla. 661, 26 So. 2d 814).

Chapters 57-362 and 57-1853 should be read together and each should be given effect. Chapter 57-362 is operative in Sarasota county to the same extent that it operates in other counties of the

state. However, because of Ch. 57-1853, the Sarasota county water and navigation control authority is substituted for the board of county commissioners and local municipal authorities, in municipalities other than the city of Sarasota.

Question 2 is answered accordingly.

AS TO QUESTION 3:

Chapter 57-362 provides that any person, firm or corporation desiring to construct islands, or add to existing lands in any unincorporated area "shall make application in writing to the board of county commissioners of the county wherein such construction is designed for a permit authorizing such person, firm, or corporation to engage in such construction provided that where it is desired to construct islands or add to or extend existing lands in islands within the territory of any municipality such application for a construction and fill permit shall be made to the governing body of such municipality. . . . the same shall be granted to the applicant, *subject to the formal approval of the Trustees of the Internal Improvement Fund.*" (Emphasis supplied.)

Under this authority the local agency may issue a fill permit; however, before such permit becomes final it is necessary that it be approved by the trustees of the internal improvement fund.

Question 3 is answered accordingly.

AS TO QUESTION 4:

The provisions of Ch. 57-362, concerning fill permits, are entirely separate and distinct from the provisions governing establishment of bulkhead lines. Section 253.122, F. S., regulates bulkhead lines and provides three methods of fixing such lines. The first method is by the board of county commissioners or governing body of any municipality of *its own initiative*. This method requires no application from the upland owner. The other two methods do require applications. Section 253.123, F. S., requires that a bulkhead line must first be established before a fill permit will be issued, and §253.124, F. S., requires an application for a fill permit to the local authority which must be approved by the trustees of the internal improvement fund. It is thus the intent of the act to require two applications and the fact that a bulkhead line has been established does not necessarily guarantee the upland owner that he will be granted a permit to fill out to the bulkhead line. To the contrary, the act provides that "any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of lands or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed." The line thus fixed is the outer limit but this does not require the local authority or the trustees to permit fill operations to such line. The fill permit which must be submitted under this act to the local authority must be approved by the trustees before becoming final the same as the bulkhead line fixed by the local authority. In this respect §253.124, F. S., provides in part: "the same shall be granted to the applicant, subject to the formal approval of the Trustees of the Internal Improvement Fund."

Question 4 is answered accordingly.

AS TO QUESTION 5:

As was pointed out earlier in this opinion, Ch. 57-362 provides that where there is by special law or general law with local ap-

plication an authority set up in the county with control over submerged lands, the authority shall replace the board of county commissioners or the local municipal authority to the extent of their authority under the local act. Chapter 57-1853 provides that the Sarasota authority shall "regulate and exercise control over the dredging and filling of all submerged bottom lands in the waters of Sarasota County, *lying outside of the corporate limits of the City of Sarasota . . .*" (emphasis supplied). Thus, the authority is substituted for the board of county commissioners in unincorporated areas of the county and for the local municipal authorities in those municipalities other than the city of Sarasota. The Sarasota county water and navigation control authority, therefore, has the responsibility of fixing bulkhead lines in that part of Longboat Key in Sarasota county. The authority should, however, request Longboat Key's approval of the bulkhead line so fixed before final establishment in order to insure protection of all interests involved and to afford Longboat Key an opportunity to protect its shoreline.

The special act provides that the authority shall approve all fill permits outside of the city of Sarasota. Therefore, fill permits in that part of Longboat Key which is in Sarasota county must be approved by the authority.

Your question is answered in the affirmative.

058-104—March 25, 1958

TAXATION

TAX LIEN—TANGIBLE PERSONAL PROPERTY WHERE BILL OF SALE EXECUTED IN COMPLIANCE WITH §726.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

The owner of tangible personal property against which tangible personal property taxes have been levied and assessed for a particular tax year, sells and transfers in bulk to another all, or a portion, of said tangible personal property.

1. If the purchaser of tangible personal property upon which taxes are not paid has a bill of sale under §726.02, F. S., from the vendor stating that the property is free and clear of all encumbrances and the tax collector is not listed as a creditor, can the tax collector levy on such tangible personal property?

2. If §726.02, F. S., has not been complied with, can the tax collector levy on the tangible personal property purchased by the purchaser?

3. If the tangible personal property involved is cattle, would the answer to the above questions be the same?

AS TO QUESTION 1:

If the purchaser in bulk of tangible personal property receives a written statement under oath by the vendor stating the names and addresses of all creditors of the vendor and gives notice to said creditors pursuant to §726.03, F. S., then the purchaser takes the property free of the claims of creditors who were omitted from the statement, unless he had actual or constructive knowledge of the existence of such creditors (37 C. J. S.,

Fraudulent Conveyances, §484). However, a tax lien which has already attached to the property cannot be so defeated (84 C. J. S., Taxation, §593). Section 200.02, F. S., provides that tangible personal property taxes become a lien against the property on the first day of January for which year the property is liable to assessment. Said lien, however, follows the goods through a bulk sale only until they are sold by the bulk purchaser in the ordinary course of business and said lien does not apply to inventories subsequently purchased to replace the goods sold. (84 C. J. S., Taxation, §593). This question is answered in the affirmative.

AS TO QUESTION 2:

In view of the discussion of question 1, no further discussion of this question is necessary. It is likewise answered in the affirmative.

AS TO QUESTION 3:

The fact that the tangible personal property involved is cattle would not change the result so long as the cattle could be identified as the property to which the lien attached. It has been held that one claiming a tax lien on personal property must be able to identify it as the subject of the assessment (*City of Tampa v. Commercial Building Co.*, 54 Fed. 2d 1057).

058-105—March 25, 1958

CITIES AND TOWNS

FIREMEN'S RELIEF AND PENSION FUND—§§175.11(1) AND 175.15, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

Section 175.15, F. S., on volunteer firemen's retirement for age and service, provides that a volunteer shall be entitled to retire on pension "if the judgment of the board of trustees so determines." Is it discretionary with the board of trustees to award a volunteer fireman a pension, or is it mandatory that he receive a pension if he so requests and is the discretion given the board simply that he meet the requirements as to age and service?

Section 175.15, F. S., provides as follows:

Where a municipality has a regularly appointed and enrolled volunteer fire department or a part-paid and part regularly appointed and enrolled volunteer fire department, any such volunteer fireman who shall have received permanent disability in the performance of his duty, which disability disables him from engaging in any gainful occupation, shall be retired upon a pension if the judgment of the board of trustees so determines, the amount of said pension to be fixed by the board of trustees in its discretion, and after twenty-five years of service and after he has attained the age of fifty-five years, *he shall be entitled to retire on a pension if the judgment of the board of trustees so determines*, the amount of said pension to be fixed by the board in its discretion, provided that no pension which may be allowed under any provision of this section shall exceed the

sum of one hundred dollars a month.

The fund created by Ch. 175, F. S., known as the firemen's relief and pension fund, is established in each municipality in this state which has a regularly organized fire department which owns or uses apparatus of a value exceeding \$5,000. The fund in each municipality is maintained primarily by a tax of 1% on gross premiums received by insurers from fire policies covering property within the municipality, and by 2% of the salary of each regular fireman. The primary difference between the retirement benefits available to a regular paid fireman under §175.11 (1), F. S., and the retirement benefits available to a volunteer under §175.15, F. S., is that the board of trustees has discretion only as to the amount of the pension to be granted to a regular fireman, but as to a volunteer the board also has the discretion as to whether a pension should be granted at all.

These observations seem to answer your question.

058-106—March 25, 1958

TAXATION

EXCISE TAX ON DOCUMENTS—MORTGAGE AND NOTE EXECUTED AND RECORDED IN ANOTHER STATE, HOME OFFICE OF MORTGAGOR IN THIS STATE—§201.01, CHS. 201, 212, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a promissory note and mortgage are executed in Georgia, the mortgage is recorded in Georgia and payment to the borrower is made in Georgia, and immediately thereafter the note and mortgage are sent to the home office of the lender in Florida, are said promissory note and mortgage subject to taxation in this state under Ch. 201, F. S.?

The tax imposed by Ch. 201, F. S., is not an ad valorem tax on property but it is an excise tax imposed upon a transaction. A state has no constitutional authority to impose a tax on property in another state, and similarly may not constitutionally impose a tax upon a transaction entirely within another state. The tax imposed by Ch. 201, F. S., is basically a tax on the creation of certain documents, but broad language is used to prevent the evasion of the tax. Section 201.01, F. S., uses the following language: "... who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state." (Emphasis supplied.) Just as there is a use tax in connection with the Florida sales tax (Ch. 212, F. S.) to prevent evasion of the sales tax by purchases in another state, the documentary stamp tax statute has a similar feature as we construe that statute.

There could be no constitutional objection to the state imposing a tax upon the "shipping" of a document into this state (see *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 75 L. Ed. 1126). Under the facts as stated in the question, it is also relevant that it was a Florida concern "for whose benefit or use the (documents) are made, signed, executed" Under such

circumstances it has been the long-standing construction of Ch. 201, F. S., by the state comptroller that such a transaction is within the meaning and intent of the statute. Since such construction is a reasonable interpretation of the statute and since the Florida legislature has not seen fit to disturb this construction, it has now acquired the force of law (Cf. *Green v. Home News Publishing Co.*, 90 So. 2d, 295).

Accordingly, your question is answered in the affirmative.

058-107—March 25, 1958

ELECTORS AND ELECTIONS

POLLING PLACES IN EACH PRECINCT—§101.71, F. S.

To: *Marian L. Crosby, Supervisor of Registration, Starke*

QUESTION:

May a county school board in conducting a special school bond election designate one polling place to serve two precincts?

Section 101.71 (1), F. S., provides, in part, "There is in each precinct in each county one polling place, managed by a board of inspectors and clerk of election . . ."

Your question is answered in the negative.

058-108—March 25, 1958

PUBLIC LANDS AND PROPERTY

PINELLAS COUNTY WATER AND NAVIGATION CONTROL AUTHORITY—CONVEYANCE OF FILL—TRUSTEES OF INTERNAL IMPROVEMENT FUND—CH. 31182, 1955; §253.122, F. S.

To: *Van H. Ferguson, Director, Trustees Internal Improvement Fund, Tallahassee*

QUESTION:

Is it necessary for the trustees to obtain the approval of the Pinellas county water and navigation control authority for a conveyance of fill made prior to June 12, 1957, but subsequent to the 1955 act which created the Pinellas county authority?

The last paragraph of §1, Ch. 57-362, 1957, provides:

When any *person*, state agency, county, city or other political subdivision has heretofore extended or added to existing lands or islands bordering on or being in the navigable waters as defined in this section by filling in or causing to be filled in such lands the trustees of the internal improvement fund shall upon application therefor convey said land so filled to the riparian owner or owners of the upland so extended or added to. The consideration for such conveyance shall be the appraised value of said lands as they existed prior to such filling. (Emphasis supplied.)

In opinion 057-393, dated Dec. 31, 1957, I held this was a mandatory provision but required no advertising. It is, therefore, necessary to examine the Pinellas county act and see what effect, if any, it has upon such a mandatory provision.

Chapter 31182, special acts, 1955, created a water and navigation control authority for Pinellas county. This authority was to

control and regulate all water and waterways in the county. Section 8 of this act provides:

That on and after the effective date of this act it shall be unlawful for any person to do any dredging, pumping of sand, extension of lands, construction or extension of islands, creating obstructions in, on, or under any of the navigable waters in Pinellas County, Florida, except under permits previously issued under Chapter 29427, Special Laws of Florida, 1953, and except as hereinafter provided.

Thus, to fill in Pinellas county without a permit was unlawful. The violator was subject to prosecution, and his fill operations could have been enjoined by the authority or any interested property owner.

The act further provides in §12(a):

The applicant or applicants for the purchase of submerged land, islands, sandbars, swamp and overflow lands, including all sovereignty lands, from the Trustees of the Internal Improvement Fund of the State of Florida shall, concurrently with the filing of said application . . . , file a copy of same with the Pinellas County Water and Navigation Control Authority

The fact that this provision does not contemplate filled lands is made apparent by subsection (e) which provides:

The recommendations of the board as submitted to the Trustees of the Internal Improvement Fund, irrespective of whether they be adverse or favorable, *shall not in any way affect any subsequent action of the Board on an application for a permit or permits to develop said land under the provisions of this act.* (Emphasis supplied.)

Thus, §12 applies to applications for the purchase of unfilled lands.

It is my opinion that the trustees do not need to obtain the approval of the authority when they convey lands filled prior to the bulkhead act, under the mandatory provision of §1.

Your question is answered in the negative.

058-109—March 25, 1958

PUBLIC LANDS

RESERVATION IN CONTRACTS AND DEEDS FOR SALE OF MINERAL RIGHTS IN STATE—NATURAL CLAY—§270.11, F. S.

To: Van H. Ferguson, Director, Trustees, Internal Improvement Fund, Tallahassee

QUESTION:

Does common clay fall within the purview of §270.11, F. S.?

Insofar as here material, §270.11, F. S., provides:

In all contracts and deeds for the sale of lands executed by the trustees of the internal improvement fund of Florida and by the state board of education of Florida, there shall be reserved for the trustees of the internal improvement fund and their successors and the state board of education an undivided three-fourths interest in, and title in and to, an undivided three-fourths interest in all the phosphate,

minerals and metals that are or may be in, on or under the said land

In opinion 053-98, dated May 11, 1953, (AGO 1953-1954, p. 353), we held that "top soil," "muck," "peat" and "humus" are not included in the statute. In so holding, we stated we did not think these materials are to be considered "mining minerals" and the statute does not contemplate ". . . they be classified as metals or minerals any more than sand and clay." (Emphasis supplied.)

It was further stated that since phosphate is the only rock mentioned in the statute, no intent of the legislature is indicated to include ". . . other forms of rock unless primarily minerals or metals in their formation."

My predecessor in office held that coral rock is not to be considered a mineral "any more than sand or clay." (AGO 1941-1942, p. 357).

In the case of *McGarvey v. Butler Consolidated Coal Co.* (Pa. 1945), 43 A. 2d 623, 625, several definitions of clay are found. Among these are: "A natural earthy material resulting from a decomposition of certain rocks, consisting essentially of a hydrated silicate of aluminum" Another definition indicates that certain minerals, including quartz, sand and iron oxide are included in the composition of clay.

The case of *Heinatz v. Allen*, (Texas), 217 S. W. 2d 994, 997, points out that the scientific and technical definition of minerals is so broad so as to embrace "not only metallic minerals, oil, gas, stone, sand, gravel and many other substances, but even the soil itself."

I cannot convince myself that the legislature intended to use the word "minerals" in §270.11, F. S., in its scientific and technical sense, but rather it had in mind the minerals which may be classified as mining minerals.

The question is, therefore, answered in the negative.

058-110—March 25, 1958

BANKING CODE

CASHING CHECKS FOR A CONSIDERATION AS BANKING UNDER FLORIDA BANKING LAWS—§§659.06 AND 659.52, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does the service of cashing payroll or other checks for a consideration, rendered by an armored car company to its customers in accordance with a written contract, constitute unauthorized banking in violation of §659.52, F. S.?

The contracts with the customers of the armored car company set forth several different methods of providing this service, depending upon the wishes of the particular customer served:

Under the terms of the contract with some of its customers the armored car company cashes the payroll checks of the employees of the customer by using the customer's money and the customer pays the company for this service.

As to other customers, the company cashes the payroll checks for the customer's employees by using the customer's money and, as set forth in the contract, charges the employees a certain per-

centage of the check cashed.

As to other customers, the company cashes the payroll checks of the customer's employees using the company's own money and the customer pays the company for providing this service.

As to other customers, the company cashes the payroll checks of its customer's employees using the company's own money and, as set forth in the terms of the contract, charges the employees a certain percentage of the check cashed.

The armored car company also cashes payroll checks at armed forces installations in accordance with written contracts with the commanding officer. The armored car company uses its own money in rendering such service and, as set forth in the contract, charges the servicemen a percentage of the amount of the check cashed.

The statutes prohibit branch banking (§659.06, F. S.). They also prohibit any person other than banks from "making payments on checks" (§659.52). This quoted language is disjunctively set forth in the statute.

It is appropriate in properly answering this question to remember that under our statutes no banking activity can be carried on at places other than in a banking house or its connected drive-in facility. It follows that an armored car company service which is the equivalent to a branch banking operation is prohibited. An analysis of the proposed armored car company service is appropriate to your inquiry. Through the operation of the armored car company service checks in wholesale lots, usually payroll checks, are cashed for a fee at points other than in a banking institution. This is a service ordinarily performed by the banks, except checks which are cashed by merchants or other nonbanking businessmen as a normal accommodation to their customers and employees or as an incident of trade. The service performed by the armored car company for the fee is a special business and not an ordinary incident of trade or accommodation. It closely approximates a function performed by banks for their customers as a banking function. It is a "making of payments on checks" similar to the function traditionally performed by banks as part and parcel of their recognized business. Competitively the armored car company would take away to the extent of its operations this item of business from the banks and the revenues which would directly or indirectly flow from it. Under our statutes we doubt that a "customer" can employ an "agent," the armored car company, to perform this service for hire or fee even though the customer may directly cash or pay its own checks.

While it is assumed that this service is intended to be restricted to the plans outlined, it is apparent it would be difficult to avoid innovations in the schemes which would further enlarge the company's competitive potential to banks. It is visualized that extensions would ensue from this opening wedge which would further curtail the scope of banking operations at the banks' places of business.

The legislature has indicated quite clearly that the state has an interest in maintaining the integrity and solvency of banking institutions for the welfare of our several communities. It has jealously guarded them against inroads which would render them more impersonal and interlocked with others and unidentified with the community.

It is common knowledge that the concentration of the various elements of banking business in banking institutions, such as the

receiving of deposits and cashing of checks and related activities, adds to the security and solvency of an institution which in turn protects depositors, furnishes the community with a financial system essential to its commercial life and the extension of credit to its citizens. Any substantial withdrawal of a portion of these banking elements to nonbanking concerns weakens the banking system and reduces its credit structure and its community service. The cashing of checks for a service charge is a recognized element of banking business. The transaction of this primary process in the banking house has secondary by-products in the form of bank deposits, savings accounts and other incidental increments. The bank in the cashing process has the opportunity to establish good will and business contacts with those for whom it performs check cashing services. When these attributes or increments which tend to strengthen the bank are shorn away by nonbanking competitive operations eliminating the traditional services of the banks, then the banking system in our state is to that extent impaired.

For these and perhaps even more cogent reasons, I doubt the authority exists in you to approve the request applied for. Unless and until the courts or the legislature either by some judicial construction or legislative modification clarifies the prohibition against branch banking or by others than banks "making payments on checks" in the wholesale and specialized manner proposed by the armored car company for a service charge, I would advise against your approval of the proposal.

At least two decisions dealing with other questions of law and fact have held that a bank by definition is an association or corporation which among other functions engages in the cashing of checks. (*In re Prudence Co.* 10 F. Supp. 33 (DC NY), *Wilson v. Louisville Title Co.* 51 S. W. (2d) 971).

In *McDougall v. Lueder* (Ill. 1945) 58 N. E. (2d) 899, it is stated:

(5) That the business of providing facilities for cashing checks, drafts, money orders and all other evidences of money falls within the police power of the State seems without question. The business of handling the people's money, issuing drafts, selling money orders under the name of the issuer and acting as a bailee in the payment of bills for a fee are endeavors requiring a certain amount of regulation and supervision. Any business conducted primarily or entirely by accepting funds of other people, undertaking to keep the funds intact for an indefinite length of time and the purchasing of paper, such as cashing checks or money orders, is one in which the public deserves more protection than only the judgment, skill and good luck of the proprietor to protect it against loss. The opportunities for loss through embezzlements, larceny, the unauthorized use of funds including bankruptcy through the mishandling of funds, is obvious. Reasonable regulation thereof falls within the powers of the legislature in the interests of the public safety.

Hence it is my opinion your question should be answered in the affirmative.

It is not intended by this opinion to preclude any contractual service rendered the armed forces by the armored car company (see item 5 on p. 2) since it is assumed that the federal law take

precedence over the provisions of the state banking code in this respect.

This opinion is confined to the facts and circumstances outlined in your letter and should not be otherwise applied.

058-111—March 25, 1958

REGULATION OF TRADE AND COMMERCE
LIQUEFIED PETROLEUM GAS LAW — APPLICATION OF
§526.12(6), F. S.—DEFINING "INSTALLATION"

To: *J. Edwin Larson, State Fire Marshal, Tallahassee*

QUESTIONS:

1. A plumber sells an LP gas water heater to a consumer, sets it in place in the consumer's home, connects water lines and then calls a licensed LP gas dealer to connect the gas lines and regulate the gas burner. Is the plumber an installer within the meaning of the LP gas laws?

2. A heating contractor sells an LP gas warm air furnace, sets it in place at a consumer's home, runs air ducts and has a licensed LP gas dealer connect gas lines to the heater. Is the heating contractor an installer within the meaning of the LP gas laws?

Section 526.13, F. S., provides for a license fee of \$10 per year for dealers in LP gas appliances and equipment and provides for a fee of \$50 for installers of said appliances and equipment. Section 526.14, F. S., provides that manufacturers of LP gas appliances and equipment, dealers in LP gas, and installers of LP gas appliances and equipment shall carry bodily injury and property damage insurance in the amount of \$25,000 or post a bond in this amount. No insurance or bond is required of dealers in LP gas appliances and equipment.

Section 526.12, F. S., "Definitions," provides as follows:

(6) **INSTALLATION.**—The act of installing apparatus, piping and tubing, appliances and equipment necessary for storing and converting liquefied petroleum gas into flame for light, heat and power for use by the ultimate consumer.

The 1957 session of the Florida legislature added the words "piping and tubing" to the definition of installation. Black's law dictionary defines "install," as follows: "To set up or fix in position for use and service."

The statutes relating to LP gas are a police measure intended for the protection of the public from the misuse of such gases, from defective gas appliances and from improper installation of gas appliances and equipment. The statutes should receive such a construction as will accomplish this purpose and make effective the protection of the public intended by such statutes.

It seems to me that any act to, or in connection with, any appliance or piece of equipment at the place where it is to be put into service is an act of installation. This would include attaching the appliance or piece of equipment to a building, connecting the appliance or piece of equipment to water lines or air ducts or attaching a flue. Any of these acts are potentially dangerous to the public and should be done only by those who are qualified and who have proven

their financial responsibility in case of any injury or damage for which they are responsible.

Accordingly, both questions are answered in the affirmative.

058-112—March 25, 1958

**REGULATION OF PROFESSIONS AND VOCATIONS
STRUCTURAL PEST CONTROL—CONTRACTOR ENGAGING
IN—§§482.02(1) AND 482.06, F. S.**

To: *Dempsey R. Sapp, Chairman, Florida Structural Pest Control Board, Gainesville*

QUESTION:

May a building contractor engage in structural pest control for the prevention of termites on a building he is constructing?

Section 482.02(1), F. S., defines structural pest control, in part, as "The identification of the infestations . . . the making of inspections and the use of pesticides . . . as well as all other substances or mechanical devices . . . for the purpose of . . . controlling and eradicating insects, . . . rodents and other pests in household structures; commercial buildings . . ."

Section 482.06, F. S., requires any person or company engaged in structural pest control to register with the state board of health, pay a license fee and comply with other requirements provided in the structural pest control act.

Although certain exemptions are provided in §482.14 to public agencies and persons working on their own property, these exemptions do not extend to "building contractors engaged in the business of constructing buildings for resale." This is not intended to imply, however, that a building contractor could not use treated materials commonly used in construction such as wood preservatives since such materials are now in general use by the public and their use would not in my opinion come within the purview of Ch. 482, F. S.

It is apparent that the legislature (in enacting Ch. 482) considered the work of structural pest control a specialized business which requires technical training and state supervision in the interest of the public safety.

Assuming, therefore, that the building contractor is not qualified under Ch. 482, F. S., to engage in the work of structural pest control, your question is answered in the negative, subject to the above comments.

058-113—March 26, 1958

**CRIMINAL PROCEDURE
BAIL BONDS—MAINTENANCE OF ACTION FOR FORFEITURE—§§903.28 AND 95.11(1), F. S.**

To: *Hamilton D. Upchurch, Assistant State Attorney, St. Augustine*

QUESTION:

May an action upon a forfeited bail bond in a criminal case be maintained when it is commenced more than one year after the date such bond is forfeited?

Section 903.28, F. S., provides as follows:

903.28 Enforcement of forfeiture.—If the forfeiture is not discharged, and the undertaking is one secured

otherwise than by the deposit of money or bonds, the prosecuting attorney shall immediately after the lapse of thirty days after the date of forfeiture, but in any event within one year from said date, proceed against the defendant or any surety upon his undertaking as follows: The prosecuting attorney shall file a certified copy of the order of the court or judge forfeiting the same, in the office of the clerk of the circuit court of the county wherein such order shall have been made, and thereupon the judge of the circuit court in said county shall enter judgment against the person bound by the undertaking for the amount of the penalty of said undertaking, and execution shall be issued to collect the amount of said undertaking.

It may well be that it was the intention of the legislature in enacting said statute to make it mandatory that proceedings to obtain a judgment on a forfeited bail bond be commenced within one year after the date of the order forfeiting the same, and I think it important that all such proceedings be commenced within such one-year period. On the other hand, it may be that in a test case the courts would hold that said statutory provision should not be construed as constituting a statute of limitations but as a procedural direction imposing a continuing duty; and that the applicable statute of limitation is that which applies to instruments under seal, viz., §95.11(1), F. S.

I have found no court decision on this point and, if you have before you a situation in which the said one-year period has elapsed and where the bail bond is of sufficient amount to confer jurisdiction upon the circuit court in an ordinary action at law, I suggest that you institute such an action and, if the circuit court should hold against you upon the ground that the action is barred by §903.28, that you promptly notify this office so that an appeal may be perfected. If this course is followed, it ought to be possible to obtain an authoritative pronouncement from the appropriate district court of appeal.

058-115—April 2, 1958

AERONAUTICS

SEAPLANE BASES—NAVIGABLE AND NON-NAVIGABLE
WATERS—RIGHTS OF THE PUBLIC—CHS. 330-333; §§253.03
AND 253.12, F. S.

To: *Florida Development Commission, Tallahassee*

QUESTIONS:

1. May a person, firm, corporation or public agency, owning or leasing lands abutting on navigable waters establish and operate a seaplane base upon such waters, using in connection therewith docks, ramps and hangars abutting on such upland?
2. May a person, firm, corporation or public agency, owning or leasing lands, including lands under non-navigable waters, use such non-navigable waters for a seaplane base when they own or lease less than the entire body of such non-navigable waters?
3. What responsibility and authority, if any, is vested in or imposed on the Florida development com-

mission to exclude boats and bathers from an area used for seaplane base purposes?

The navigable waters of the state "include lakes, rivers, bays or harbors, and all waters capable of practical navigation for useful purposes, whether affected by the tides or not, and whether the water is navigable or not in all its parts toward the outside lines or elsewhere, or whether the waters are navigable during the entire year or not . . ." (Martin v. Bush, 93 Fla. 535, 112 So. 274, text 283; see also Clements v. Watson, 63 Fla. 109, 58 So. 25, text 26; Broward v. Mabry, 58 Fla. 398, 50 So. 826, text 830). When Florida was admitted as a member of the union, it, by virtue of its sovereignty, became the owner, for the benefit of its inhabitants, of all lands under the navigable waters of the state; the use and disposition of such lands are within the regulating province of the state legislature with due regard to the rights of the public to use such waters and the dominant power of congress over such navigable waters (Political and Legal History of Florida, by Justice Whitfield, 1 F. L. A., pp CXX, et seq.). Certain submerged sovereignty lands, under §253.12, et seq., F. S., may be sold into private ownership, when substantial rights of the public in the use of the navigable waters are not unlawfully invaded and the authority of congress, as to navigable waters, are not interfered with.

"The rights of the people of the state in the navigable waters and the lands thereunder, including the shore and space between ordinary high and low water marks, relate to navigation, commerce, fishing, bathing and other easements allowed by law. These rights are designed to promote the general welfare, and are subject to lawful regulation of the states, and such regulation is subordinate to the powers of Congress as to interstate commerce, navigation, post roads, etc., and to the constitutional guarantee of private property rights" (Brickell v. Trammell, 77 Fla. 544, 82 So. 221, text 226; see also Miami Beach v. Hogan, Fla., 63 So. 2d 493, text 495). Private ownership of lands abutting on navigable waters stops at the highwater mark, and the state holds the foreshore in trust for its people for purposes of navigation, fishing and bathing (White v. Hughes, 139 Fla. 54, 190 So. 446, text 449).

The rights of owners of lands abutting on navigable waters, in addition to their rights as members of the public, are to an unobstructed view and access to the channel over the foreshore and across the waters toward the channel (Hays v. Bowman, Fla., 91 So. 2d 795). Riparian owners on navigable waters have right of access, with right to bathe, fish and navigate the navigable waters, subject to governmental regulation (Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841). "Riparian rights have been often enumerated to include the right of access to the water, the right to build a pier out to the line of navigability, the right to accretions, and the right to a reasonable use of the water as it flows past the land . . ." (65 C. J. S. 145, §61).

The federal government in surveying public lands has considered certain waters as navigable and has meandered such waters; other waters it has considered non-navigable and has not meandered such waters, but has surveyed them, including such waters, as land. However, such surveys are merely prima facie and not conclusive as to the nature of such waters (65 C. J. S. 211-212, §96). The prima facie effect of a survey, as to the nature of waters, may be impeached and the true character of the waters determined (see Baker

v. State, Fla., 87 So. 497). For the purposes of this opinion we shall deem meandered bodies of water as navigable waters and surveyed bodies of water as non-navigable waters.

Licensing of airports; water areas, etc.—A reading of Chs. 330, 331, 332 and 333, F. S., indicates that they apply to water areas used for the landing and taking off of aircraft, as well as land areas used for the same purpose. Under these statutes the Florida development commission may adopt rules and regulations governing the establishment and operation of airports, including ports used for the taking off and landing of seaplanes. Where an airport includes a water area used for the taking off and landing of seaplanes, a permit or license for such operation must be obtained. Where such an airport is to be established upon any of the navigable waters of this state, title to which is vested in the trustees of the internal improvement fund (§§253.12, et seq., F. S.), or in the state itself (§253.03, F. S.), we deem it advisable if not necessary that a permit to use the submerged lands, including the foreshore, be obtained from the trustees of the internal improvement fund. Application should also be made to the department of the army for a permit to use the navigable waters for such purpose. These observations seem to answer the 1st question.

Use of non-navigable waters.—In considering the use of non-navigable bodies of water, we shall consider the rights of the public in such waters, the rights of owners of lands abutting on such waters, and the rights of owners of all or portions of the lands under such waters. "While ownership of a portion of the bed of a lake or pond (non-navigable waters) does not confer the right to use the entire surface of the lake or pond, in the absence of an easement or license, it has been held that one of several riparian owners, and anyone holding under him, may use the surface of the whole lake as far as such use does not interfere with the reasonable use of the water by the riparian owners" (93 C. J. S. 790-791, §105; 67 C. J. 850-851, notes 31 and 32; see also 56 Am. Jur. 542-543, §60; Beach v. Hayner, 207 Mich. 93, 173 N. W. 487, 5 A. L. R. 1052). The statement was made in *Sterline v. Jackson*, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405 (cited with approval in *Beach v. Hayner*, supra), that "small and entirely private lakes are sometimes divided up for such purposes as require separate use; but for uses like boating, and similar surface privileges, the enjoyment is almost universally held to be in common. This was held by the House of Lords in *Menzies v. MacDonald*, 36 Eng. Law and Equity 20. It was there held that for all purposes of boating and fishing, the whole lake was open to every riparian owner; while for such fishing as required the use of the shore, each was confined to his own land for drawing seines ashore, and the like uses." This rule has been followed in other states (see *Sanders v. DeRose, Ind.*, 186 N. E. 388; *Improved Realty Corp. v. Sowers, Va.*, 78 N. E. 2d 599; *Snively v. Jaber, Wash.*, 296 P. 2d 1015; *State v. Game and Fish Commission v. Louis Fritz Co., Miss.*, 193 So. 9, text 11).

Airport on non-navigable waters.—In the light of the authorities mentioned in the last above paragraph, it is doubted that where an owner of certain lands, but less than the whole, underlying a non-navigable lake or pond wishes to establish an airport thereon, for the landing and taking off of seaplanes, it seems advisable that he, before using any of the waters covering lands owned by others, should obtain leases or licenses from such other owners for the use of the waters above their submerged lands. This would seem to be

advisable due to the uncertainty of the law upon the question. In order to anchor the seaplanes it would seem necessary that they be anchored to facilities connected with the lands along the shore or with the submerged lands; this would seem to require the use of the submerged lands or the lands along the shore. These observations seem to answer the 2nd question.

Use of the waters by the public.—Where an airport is established using navigable waters for the landing and taking off of seaplanes, questions of the right of the public to use the same waters arise. Substantial rights of the public seem, therefore, to be here involved. The public has the right to use the navigable waters of the state for navigation, commerce, fishing, bathing and otherwise as permitted by law. These rights appear to be vested ones and may not be divested except by due process of the laws. Although the primary powers and duties of the Florida Development Commission seem to relate to the safety of air travel and of aircraft, for this safety to be effective, it would seem that boats and bathers must be excluded from the area used by the aircraft in landing and taking off; however, in this same connection we must not lose sight of the rights of the public to use the navigable waters of the state. This rule has no application to the non-navigable waters of the state. The law in this state is not clear, and probably not entirely satisfactory, in this connection.

Answering the above stated questions, you are advised as follows:

1. Persons, firms, corporations or public agencies, owning or leasing lands abutting on navigable waters may establish and operate seaplane bases upon such waters, provided, they comply with the requirements of chapters 330-333, Florida Statutes, obtain a license or permit from the Trustees of the Internal Improvement Fund as to the use of the submerged lands and foreshore, and comply with any requirements of the federal government.

2. Persons, firms, corporations or public agencies, owning or leasing lands, including lands under non-navigable waters, may use such waters for a seaplane base, when they own less than the entire body of non-navigable waters, only when they have obtained licenses or permits from other owners of submerged lands or make no use whatsoever of the waters over lands owned by others.

3. Although there may be some doubt as to the power of enforcement in all cases, we feel that it is the duty of the Florida Development Commission to adopt and promulgate such rules and regulations as it may deem necessary or proper for the safety of the general public, and the aircraft and their personnel and passengers using the airport. Due opportunity should be given the public to present its side of the question in this connection.

Any rules so adopted should be adopted by the commission duly assembled in regular or properly called special meeting and not by some agency or officer thereof.

058-116—April 3, 1958

PUBLIC WELFARE

**OFFICE OF STATE WELFARE DIRECTOR—ELIGIBILITY OF
LEGISLATOR FOR EMPLOYMENT—§409.11, F. S.,
§5, ART. III, STATE CONST.**

To: LeRoy Collins, Governor, Tallahassee

QUESTIONS:

1. Is the office of state welfare director a "civil office under the constitution of this state?"
2. Did the 1957 legislature "increase the emoluments" of the office of state welfare director?
3. Is the state welfare director "appointed" to his office?
4. Is a legislator who was elected for a term of two years at the general election in November, 1956, eligible to be employed as the state welfare director before the time for which he was elected expires?

AS TO QUESTION 1:

In defining the term civil officer the Florida supreme court in *State ex rel Landis v. Futch*, 122 Fla. 837, 165 So. 907, at p. 909, said, "A civil officer pertains to the exercise of the power or authority of civil government under the Constitution of the state. See *In Re Advisory Opinion to the Governor*, 94 Fla. 620, 113 So. 913." In the advisory opinion cited therein, Governor Martin asked:

(1) What is a civil office under the *Constitution* of this state, within the meaning and intent of section 5, of article 3 of the Constitution of Florida, in so far as the same is a limitation upon the executive power of the Governor to make appointments under the authority vested in him by the Constitution of this state? (Emphasis supplied.)

Although the supreme court failed to render a direct and definitive answer to the quoted question, the court did say:

A civil office is an office, not merely military in its nature, that pertains to the exercise of the powers or authority of civil government.

The office of "state motor vehicle commissioner" and the office of "special assistant to the Attorney General," as defined by the statutes creating them, are civil offices, since they pertain to the exercise of the power and authority of the civil government of the state.

In *Advisory Opinion to the Governor*, 49 Fla. 269, 39 So. 63, at p. 64, the Florida supreme court said:

To the first of these questions our answer is that, from the duties mentioned in your communication as devolving upon such board of control, viz., locating and continuously and permanently controlling and managing state institutions of learning, subject to the supervision of the state board of education, and whose term of office are definitely fixed, with provision for removal and appointment to fill vacancies on such board, the members of such board of control will, under our Constitution, when

appointed, be civil officers of the state.

In *State ex rel Clyatt v. Hocker*, 39 Fla. 477, 22 So. 721, at 723, the supreme court of Florida said:

... the various definitions and essential elements of the term "office" as given in the cases cited and others, is very aptly and correctly summarized as follows: "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised in behalf of government, and not to a merely transient, occasional, or incidental employment. A person, in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining, though the incumbent dies or is changed, ... is a public officer ..."

This case has been cited with approval in *Blackburn v. Brorein*, Fla., 70 So. 2d 293, at 297.

Section 409.11, F. S., provides in part:

The state board shall *employ* an administrator who shall be designated as state welfare director and shall prescribe his duties and functions in carrying out the purposes of this chapter. (Emphasis supplied.)

It appears from the above citations that the important questions for consideration in determining whether a particular position is a constitutional office or not are: (1) is there a delegation of a portion of the sovereign power of the state; (2) is there tenure, duration or permanent public trust attached to the office; (3) is the office filled by election of the people or appointment by the governor; and (4) are the duties of the office prescribed by the rules of government.

The duties of the state welfare director as outlined by the state welfare board committee on personnel as of March, 1956, are to make recommendations to the state welfare board and then carry out the policies and directions of said board. It appears from this and §409.11, F. S., that the state welfare director has not been delegated any portion of sovereign power as such delegation, if any, apparently remains with the state welfare board. Inasmuch as the director serves at the pleasure of the state welfare board, the idea of tenure or permanent public trust cannot be an element of the particular position. The position is not filled by election nor does the person filling said position receive an appointment or commission from the governor. While the duties of the director have been described by a committee of the state welfare board, these duties are apparently subject to change at the pleasure of the board and since the duties are only vaguely set out in the statutes, they cannot validly be con-

sidered as being prescribed in the permanent rules of government.

It appears from the above discussion that the position in question does not meet the test for constitutional offices and, therefore, your 1st question is answered in the negative.

AS TO QUESTION 2:

Black's law dictionary defines emolument as that which is received as compensation for services or which is annexed to the possession of office as *salary*, fees, or perquisites.

Section 409.111, F. S., provides the *salary* of the director and assistant director shall be set by the legislature. The general appropriation of 1955-1957 set out in §282.01 (1), item 62, a, 1, provides, "Salaries—including salary of \$8,000 per annum for the director" The general appropriation of 1957-1959, set out in §282.01 (1), item 66, a, 1, provides, "Salaries—including salary of \$12,000 per annum for the director"

Inasmuch as the *salary* of the office of the state welfare director is an emolument of that office and it was increased from \$8,000 in 1955 to \$12,000 in 1957 by an appropriation of the legislature, it appears that the 1957 legislature *did* increase the emoluments of the office of the state welfare director. Therefore, question 2 is answered in the affirmative.

AS TO QUESTION 3:

It is assumed that this question is asked in the light of §5, Art. III, State Const., which provides:

Ineligibility of legislators to office.—No Senator or member of the House of Representatives shall during the time for which he was elected, be *appointed*, or elected to any civil office under the Constitution of this State that has been created, or the emoluments whereof shall have been increased during such time." (Emphasis supplied.)

It is noted that §409.11, F. S., quoted in question 1 above, refers to *employment* rather than appointment of a director. Since appointment merely refers to the designation of a certain person to perform a particular duty or function, an employee could be appointed. However, in view of the wording of the statutes of the status of the position as indicated by the statutes and directives of the agency, the word *employment* would appear preferable to the word *appointment* in the light of the above quoted constitutional provision, and question 3 is therefore answered in the negative.

AS TO QUESTION 4:

Section 5, Art. III, State Const., as quoted in question 3 is also applicable here. It has been determined above (see question 2) that the 1957 legislature increased the emoluments of the office of the state welfare director. The office in question is, however, definitely not filled by election and I am inclined toward the position that the office of state welfare director is not filled by appointment on the basis of the discussion set out in question 3 above. This constitutional provision should be strictly construed to uphold the officer's eligibility if reasonably possible. State ex rel Fraser v. Gay, 158 Fla. 465, 28 So. 2d 901, State ex rel Hawthorne v. Wiseheart, 158, Fla. 267, 28 So. 2d 589. It is the opinion of this office that §5, Art. III, State Const., is not applicable to employees and, therefore, question 4 is answered in the affirmative.

058-117—April 3, 1958

CRIMINAL PROCEDURE

UNIFORM COMMITMENT FORMS—PREPARATION FOR AND SUPPLY TO SHERIFFS BY DIRECTOR OF DIVISION OF CORRECTIONS—§§965.01(1)(d), 944.17 AND 944.26, F. S.

To: R. O. Culver, Director, Division of Corrections, Tallahassee
QUESTION:

Does the director of the division of corrections have the authority to prescribe forms of certificates to be used by the sheriffs in certifying to the division of corrections the information which §944.26, F. S., requires the sheriffs to certify to said division?

Section 944.26 F. S., reads as follows:

944.26 When term starts running.—

(1) A sentence to imprisonment shall be deemed to commence on the date of the delivery of the defendant to the custody of the department; provided, however, that any period of time during which the defendant was incarcerated in the county jail after sentence, but before his delivery into the custody of the department, shall be credited on the sentence if there be only one sentence and on the first sentence imposed if there be more than one sentence.

(2) When the sheriff delivers a defendant into the custody of the department he shall certify to the department the period of time during which the defendant was so incarcerated, including the dates of such incarcerations, and, if there be more than one sentence, the sheriff shall also certify which sentence was first imposed. Such certification shall be prima facie evidence of the facts therein certified.

This statute mandatorily requires the sheriff, when he delivers a defendant into the custody of the department of corrections, to certify to the department the period of time during which the defendant was incarcerated in the county jail after sentence but before his delivery into the custody of the department; and it requires that if there be more than one sentence he shall certify which sentence was first imposed. (The term "department of corrections," as used in the foregoing statute, means "division of corrections." See §965.01(1)(d), F. S. Therefore, the sheriff's certificate under §944.26 is to be made to the "division of corrections.")

Although §944.17, F. S., authorizes the director to prescribe uniform commitments, §944.26 does not authorize him to prescribe the forms of the certificates to be used by the sheriffs in complying therewith. However, the sheriffs must make the certificates required by §944.26 and I think that it would be helpful to them as well as to the division of corrections and would tend toward uniformity if the director would have a supply of forms printed and transmitted to the sheriffs so that they would be available if the sheriffs should desire to use them instead of going to the trouble of preparing their own forms.

The two suggested forms which you submitted to me read substantially as follows:

(ATTACH THIS CERTIFICATE TO COMMITMENT)
 SHERIFF'S CERTIFICATE TO DIVISION OF CORRECTIONS
 UNDER SECTION 944.26, FLORIDA STATUTES 1957.
 (TO BE USED WHEN DEFENDANT NOT RELEASED ON
 BOND AFTER BEING INCARCERATED IN COUNTY JAIL
 UNDER SENTENCE.)

TO THE DIVISION OF CORRECTIONS OF THE STATE OF
 FLORIDA:

I hereby certify as follows:

_____, the defendant named
 in the attached commitment, was incarcerated in the County Jail
 of _____ County, Florida, under the sentence men-
 tioned in said commitment, from the _____ day of _____,
 195____, until the _____ day of _____, 195____. He has
 not been incarcerated in the County Jail under said sentence dur-
 ing any other period of time.

The said defendant was not released on bond after being
 incarcerated during the period aforesaid.

The said sentence was the _____

(Insert "only" or "first")

prison sentence imposed upon said defendant.

This the _____ day of _____, 195____.

Sheriff of _____
 County, Florida.

(ATTACH THIS CERTIFICATE TO COMMITMENT)
 SHERIFF'S CERTIFICATE TO DIVISION OF CORRECTIONS
 UNDER SECTION 944.26, FLORIDA STATUTES 1957.
 (TO BE USED WHEN THE DEFENDANT IS RELEASED ON
 BOND AFTER BEING INCARCERATED UNDER SENTENCE
 AND IS LATER REINCARCERATED.)

TO THE DIVISION OF CORRECTIONS OF THE STATE OF
 FLORIDA:

I hereby certify as follows:

_____, the defendant named
 in the attached commitment, was incarcerated in the County Jail
 of _____ County, Florida, under the sentence men-
 tioned in said commitment, from the _____ day of _____,
 195____, until the _____ day of _____, 195____.

The said defendant was released on bond after being incar-
 cerated during the period aforesaid and he was thereafter rein-
 carcerated in said jail under said sentence from the _____ day of _____,
 195____, until the _____ day of _____,
 195____.

The said defendant was not incarcerated in the County Jail
 under said sentence for any period of time other than those
 which are set forth above.

The said sentence was the _____

(Insert "only" or "first")

prison sentence imposed upon said defendant.

This the _____ day of _____, 195____.

Sheriff of _____
 County, Florida.

Said forms will be applicable to all ordinary situations and
 I think that it would prove helpful if you would have a supply

of each form printed and transmitted to the sheriffs for their use if they desire to use them.

058-118—April 4, 1958

CRIMINAL PROCEDURE

CRIMINAL CASES—AUTHORITY OF COUNTY JUDGE TO DISMISS UPON ESTREAT OF BOND

To: Mahlon C. McCall, County Judge, Milton

QUESTION:

Does the county judge have the legal authority to dismiss a misdemeanor case within his jurisdiction to try after the defendant's cash bond has been estreated following his failure to appear in court on the return day thereof?

In the case of *Wilson v. Renfro*, 91 So. 2d 857, the supreme court of Florida dealt with the authority of a county prosecuting attorney with regard to the nolle prosequi or discontinuance of a prosecution pending in the county judge's court of Leon county. In that case the supreme court said:

Under the common law of England prosecution in criminal cases were controlled by *THE ATTORNEY GENERAL* and he *ALONE HAD THE EXCLUSIVE DISCRETION TO DECIDE WHETHER PROSECUTION SHOULD BE DISCONTINUED PRIOR TO THE INCEPTION OF JEOPARDY*. In the absence of statute, the common law continues to be in force in most of the states of this country. Florida has adopted no statute on the subject. (Emphasis supplied.)

In Florida the powers and duties performed by the attorney general at common law with regard to the nolle prosequi or discontinuance of a criminal prosecution have largely become vested in the local prosecuting attorneys and I am of the opinion that a prosecuting attorney now has the same power and authority to control a criminal case as the attorney general formerly had. Therefore, since a defendant whose bail bond has been estreated because of his failure to appear has not been put in jeopardy, it is my opinion that the county prosecuting attorney has the exclusive discretion to decide whether the prosecution against such defendant in the county judge's court should be discontinued; and that the county judge is not empowered with discretion to dismiss the prosecution in such a situation.

My opinion on this point is in line with the following quotation from 14 Am. Jur. 968-969, Criminal Law, §300:

Since, as shown above, in the absence of statute, ordinarily the entry of a nolle prosequi is left to the exclusive discretion of the prosecuting officer, the court has no power to direct or compel the entry thereof by the prosecuting attorney. *In the absence of statute, the court has no power of its own motion to enter a nolle prosequi to a good indictment or to dismiss a criminal prosecution, except at the instance of the prosecuting officer.* (Emphasis supplied.)

To the same effect is the Annotation in 69 A. L. R. 240 et seq. As to whether the county prosecuting attorney should nolle

prosequi a particular case is of course to be governed by sound discretion exercised in the light of the facts and circumstances.

It is therefore my opinion that your question is properly answered in the negative; except, however, that if there be a county with a county judge's court but with no county prosecuting attorney selected by the county commissioners under §125.03, F. S., or otherwise selected under special act of the legislature, I think that the county judge of that county would have the same authority to dismiss a criminal case as the county prosecuting attorney, if there were one, would have to nolle prosequi it.

058-119—April 7, 1958

EDUCATION

THE SCHOOL PLANT—MINIMUM REQUIREMENTS FOR SCHOOL BUILDINGS—ISSUANCE OF BUILDING PERMIT UNDER MUNICIPAL BUILDING CODES—§235.26, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

May the city of West Palm Beach require architects and contractors employed by the county school board in the construction of public school buildings in said city, said construction complying with the provisions of the general statutes of the state (specifically Ch. 235, F. S.) as implemented by state department of education regulations, to amend plans to conform to the municipal building code; and upon failure of such amendment may said municipality withhold a building permit and thereby prohibit the contemplated construction?

Section 235.26, F. S., sets forth in considerable detail the minimum standard building requirements for all public school construction in Florida.

From time to time various state board of education regulations have been adopted implementing and amplifying §235.26, F. S. In addition to the above, plans for school construction must be approved by the state school architect before the state superintendent of public instruction will approve the plans, as required by §235.26, F. S.

Withal, it would appear that a comprehensive, detailed program for school construction and the establishment of desired standards based on the wide range of experience of the state school system have now been established on a statewide basis by general statutory law and state board of education regulations and procedures.

In 1947 my predecessor in office issued A. G. O. 047-289 in which he held that the minimum standards set up in the school code for school construction were not exclusive and that although such minimum standards must be complied with in all cases, they do not exempt school boards from compliance with additional and reasonable municipal building code regulations which are designed for the safety, health and welfare of the occupants of the buildings and the public generally.

On Feb. 24, 1958, I issued A. G. O. 058-67 on a similar question but in which I reached a somewhat different conclusion.

In this opinion I said:

Generally speaking, the state is not subject to legislative enactments of a municipal corporation and the property of the state and its agencies is free from municipal direction. (Ky. Institution for Ed. of Blind v. Louisville, 97 S. W. 402, 123 Ky. 767, 30 Ky. L. 136, 8 L. R. A., N. S. 53; 62 C. J. S., Municipal Corp., §159; 9 Am. Jur., Bldgs., §6.)

This rule has been accepted in most jurisdictions, particularly in connection with construction of school buildings, because in many states, as in Florida, the requirements for the construction of school buildings are laid down by general statutes. (Ch. 235, F. S.)

Upon careful reconsideration, I am of the opinion that the conclusion reached in my opinion of Feb. 24, 1958, is correct and the A. G. O. of 1947 (047-289) is therefore rescinded to the extent that it is in conflict with opinion 058-67.

In the case of Johnson v. State of Maryland, 254 U. S. Reports 51, Mr. Justice Holmes in delivering the opinion of the U. S. supreme court, said:

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the department to employ persons competent for their work and that duty, it must be presumed has been performed.

I think this is analagous to the relationship between the state and its chartered municipalities. When the state has established its own building code for school buildings, I do not believe that a municipality has legal authority to interfere by ordinance unless the city's charter specifically grants it such authority. I am advised that such is not the case in this instance. "The state is not bound by the provisions of a municipal charter or ordinance unless it is mentioned. . . specifically or by necessary implication." *Ex parte Means*, (Cal. 1939) 93 P. 2d 105.

See also *Hall v. City of Taft*, 302 P 2nd 575 (1956); *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N. W. 642 (1909); *Board of Education v. St. Louis*, 267 Mo. 356, 184 S. W. 975; *Salt Lake City v. Board of Education*, 52 Utah 540, 175 P. 654.

It is my opinion that unless there is a clear showing of a defect in the plans approved by the state for school construction which is of such a serious nature that the health and safety of the occupants of the building and public generally would be endangered, a municipality (unless specifically authorized by its charter) has no authority to interfere with said state-approved plans. If such defect should exist, I think the city or any interested party would have adequate recourse to correct the defect through proper proceedings in a court of competent jurisdiction.

I note that §235.26 (11)(a), F. S., provides, "All wiring and other electrical work installed in any building shall be in accordance with regulations of the national board of fire underwriters and, in addition, shall meet all requirements of the southeastern underwriters association and of any other state or local official agency."

This particular provision of the state school construction code does require compliance (in the installation of wiring) with the municipality's standards. I am advised, however, that both the building code of West Palm Beach and the state school building standards in this respect are based upon the regulations of the national board of fire underwriters and are in accord with the requirements of the Southeastern Underwriters Ass'n. There should therefore be no dispute on this point between the city's building code and the standards provided by the state school code and state board of education regulations.

I am advised that school construction is in almost all cases carried out with a high degree of cooperation between state, county and municipal officials as contemplated by law and that minor differences of opinion as to construction standards are ordinarily settled by a mutual willingness to cooperate in the interest of the school system and the public in general. This is of course a desirable solution and one which I hope can be applied to this specific situation.

Subject to the above observations, your questions are answered in the negative.

058-120—April 7, 1958

INSURANCE

EXCEPTIONS TO PROHIBITION AGAINST INSURANCE CONTRACTS WITH OUT-OF-STATE RESIDENTS—PATHWAY MUTUAL INSURANCE COMPANY, CHURCH OF GOD—§§625.38 AND 625.39, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

Is it permissible for Pathway Mutual Insurance Co. to negotiate in this state fire insurance policies on properties of the Church of God, which properties are located in "reciprocal states" as defined by §625.39, F. S., if the insurance is negotiated through the insurant who is the highest officer of the Church of God and who is a resident of this state?

We are informed that Pathway Mutual Insurance Co., a Florida corporation, was organized by members of the clergy and officers of the governing body of the Church of God and that the highest officer of this church group is a resident of Florida and attends to the management of church properties in all the several states. We are further informed that it has been the practice for insurance coverage on each church and parsonage in all the states to be negotiated in Florida.

Section 625.38, F. S., provides in part as follows:

Insurance contracts with out-of-state residents prohibited; exception.—No insurance company organized under the laws of this state shall enter into a contract of in-

insurance upon the life of or person of a resident of a reciprocal state, or covering property or risks located in a reciprocal state, unless each insurer is authorized pursuant to the laws of such reciprocal state to do business therein, subject to the following exceptions:

(1) Contracts entered into where the prospective insured is personally present in the state in which the insurer is authorized to do business when he signs the application.

The evident purpose of §625.38, F. S., is to make it a violation of Florida law for a corporation organized in Florida to do business in a state in which it is not qualified if said state is a reciprocal state. A "reciprocal state" is a state which similarly restrains its insurance companies from doing business in Florida unless they are licensed here. On the facts of the question at hand, Pathway is not doing business in reciprocal states. Even though the subject matter of the insurance contract is located in a state, the laws of that state have no effect upon the contract if it is negotiated entirely beyond the boundaries of said state, and said negotiation does not constitute "doing business" within said state (Appleman, Insurance Law and Practice, Vol. 19, §10351).

Section 625.38, F. S., makes a specific exception for contracts in which the insured is personally present in the state in which the insurer is authorized to do business. Since the representative of the Church of God, the insured, is a resident of this state, and since Pathway is authorized to do business in this state, it is my opinion that the negotiation *in this state* of fire insurance policies on property in reciprocal states will not violate the laws of Florida.

Your question is answered in the affirmative.

058-121—April 7, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS—
PUBLIC BUSINESS
COUNTY HEALTH UNITS—STATE FIRE INSURANCE FUND
—CHS. 154 AND 284, F. S.**

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

Is property owned by local county health units insurable in the state fire insurance fund created by Ch. 284, F. S.?

Chapter 154, F. S., authorizes the several counties of the state to cooperate with the state board of health in the establishment and maintenance of full-time local health units. The several counties are authorized to levy taxes, the proceeds of which are paid to the state board of health to be expended by the board, together with appropriations from the general revenue fund, for the purpose of carrying out the provisions of said chapter.

It was determined in A. G. O. 056-174 (1955-56 Biennial Report, p. 687) that for some purposes the county health units operated by the state board of health are state agencies and that the personnel of these health units are state employees. Said

opinion, however, is not determinative of the question at hand.

Chapter 284, F. S., provides that state property is insurable in the state fire insurance fund but there is no provision which makes property of the several counties insurable in said fund. Property, therefore, that is owned by county health units and title to which is not held by the state is not property which is insurable in the state fire insurance fund, notwithstanding the fact that said property is administered, used and maintained by a state agency.

Your question is answered in the negative.

058-122—April 8, 1958

TAXATION

FUTCH ACTS OF 1933 AND 1935—EFFECT OF OMITTING LANDS FROM TAX ROLL—CHS. 16252, 1933 AND 17400, 1935—§§192.04, 192.21, 193.21 AND 193.23, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where there was an outstanding tax sale certificate encumbering certain lands within the purview of the Futch acts, or one of them, but such lands were entirely omitted from the tax rolls from 1905 until 1948 when they were put back on the said rolls, did such omission bring the said lands under the Futch acts so as to authorize cancellation under the 1941 act?

The first Futch act (Ch. 16252, 1933) was made applicable to tax sale certificates for the year 1931 and previous years, provided taxes "assessed for the years 1932, 1933, 1934, 1935 and 1936 shall have been paid in full prior to said July 1, 1937." The second Futch act (Ch. 17400, 1935) was made applicable to tax sale certificates for the year 1933 and previous years, provided taxes "assessed for the years 1934, 1935, 1936, 1937 and 1938 shall have been paid in full prior to said July 1, 1939." These acts also required the assessment of taxes against all such lands for the years 1933 and 1935 and all subsequent years "in like manner and to the same effect as if no taxes against such lands were delinquent . . ." (§3 of each said act). There was a mandatory duty on the tax assessors to assess subsequent taxes on all such lands for the years 1933 and 1935 and subsequent years, whether tax returns were made or not.

The omission of the lands in question from the tax rolls between 1905 and 1948 doubtless was an "act of omission or commission on the part of any tax assessor, or any assistant tax assessor, . . . which may be corrected at any time by the officer or party responsible for the same . . ." (§192.21, F. S.); however, under §193.23, F. S., the back assessment of omitted taxes may not be for more than three years, and this being true, the taxes that should have been assessed for said years from 1905 to 1948 may not now be assessed. Section 193.23, therefore, seems to be a limitation upon the above quoted portion of §192.21, F. S. Although an imperfect attempt to make an assessment of lands for tax purposes may be invalid, it does not impair the statutory lien imposed by §193.21, F. S., and probably may be corrected, under said §193.21, when made after the enactment of Ch. 10040,

1925, as an omission or commission of the tax assessor; the entire omission of the lands from the tax roll is not an imperfect assessment but no assessment at all. In this state it appears that the lien for taxes attaches by reason of the assessment which, by §192.04, F. S., is as of January 1 of the tax year (see *Bloxham v. Consumers' Electric Light and Street Railroad Co.*, 36 Fla. 519, 18 So. 444, text 447; *Huckleby v. State*, 57 Fla. 433, 48 So. 979, text 980 and first headnote; *Certain Lots v. Monticello*, 159 Fla. 134, 31 So. 2d 905, text 914; 84 C. J. S. 1182-1183, §587). The last mentioned authority states that "in the absence of a statute providing otherwise a valid assessment of the tax is ordinarily essential to the creation of a tax lien." Section 192.21, F. S., provides in part that "all taxes imposed pursuant to the constitution and the laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed and shall continue in full force and effect until discharged by payment" This provision seems to contemplate an assessment as a condition for the attaching of the lien.

The land, not having been entered on the tax rolls between 1905 and 1948, taxes never became liens on the lands involved and there were no taxes due or payable for the said omitted years. When the lands were returned to the tax roll in 1948 there was no authority to back assess for the years 1932 through 1938. There were no taxes due and payable for the years covered by the Futch acts. No taxes were due for said years, so that no taxes were paid for those years. Their status was similar to lands exempted by law, such as those entitled to homestead tax exemption.

In the light of the above statutes, authorities and observations, the above stated question is answered in the affirmative.

058-124—April 9, 1958

TAXATION

ELIGIBILITY FOR HOMESTEAD TAX EXEMPTION—QUALIFICATION AS ELECTOR—§7, ART. X AND §1, ART. VI, STATE CONST.

To: *State Association of Supervisors of Registration, Tallahassee*
QUESTION:

May a person claim homestead tax exemption in a county other than that in which he is registered as qualified elector at all elections under the state constitution?

Under §7, Art. X, State Const., "every person who has the legal title or beneficial title in equity to real property in this state and *who resides thereon and in good faith makes the same his or her permanent home . . .* shall be entitled to an exemption from taxation" The above quoted language from said §7 is taken from the said section as amended at the general election in 1938, prior to which amendment the homestead tax exemption was to "every head of a family *who is a citizen of and resides in the State of Florida . . .*" In *Steuart, Tax Assessor, v. State*, 119 Fla. 117, 161 So. 378, which arose under the 1934 amendment and prior to the 1938 amendment, it was held that an alien of the U. S., although making his permanent home in this state, was not entitled to the homestead tax exemption allowed by the 1934 amendment. However, the same

question arose, in *Smith v. Voight*, 158 Fla. 366, 28 So. 2d 426, after the adoption of the 1938 amendment and it was held that an alien of the U. S. residing in Florida and making his permanent home therein was entitled to the said exemption. These two cases demonstrate that the requirements for homestead tax exemption under original §7, Art. X, State Const. (adopted in 1934) were more exacting for claiming the exemption than is the 1938 amendment.

Under §1, Art. VI, State Const., for one to register as a qualified elector to vote at all elections under the state constitution he must "be a citizen of the United States" and must have "had his *habitation, domicile, home and place of permanent abode*" in the state for one year and in the county for six months or more. Although for one to be entitled to homestead tax exemption he is only required to reside on the property claimed as exempt "*and in good faith make the same his or her permanent home*"; for such person to qualify to vote at elections under the Florida constitution he must be a citizen of the United States and have "had his *habitation, domicile, home and place of permanent abode*" in the state and county for the time required by the state constitution. "While the terms 'domicile' and 'residence' are frequently used synonymously, they are not, when accurately used, convertible terms. The former is of more extensive signification and includes, beyond mere physical presence at the particular locality, positive or presumptive proof of an intention to constitute it a permanent abiding place. 'Residence' is of a more temporary character than 'domicile.' 'Residence' simply indicates the place of abode, whether permanent or temporary; 'domicile' denotes a fixed, permanent residence, to which, when absent, one has the intention of returning" (*Minick v. Minick*, 111 Fla. 469, 149 So. 483, text 488). "One may be a resident of one jurisdiction although having a domicile in another" (*Minick v. Minick*, supra, citing 9 R. C. L. 539). The meaning of "domicile" depends, in each instance, upon the connection in which it is used (11 Fla. Jur. 3, §2). In *Herron v. Passailaigue*, 92 Fla. 818, 110 So. 539, text 543, the court said that the rule was well "settled that the term 'residence,' 'residing,' or equivalent terms, when used in statutes, or actions, or suits, relating to taxation, *right of suffrage*, divorce, limitations of actions, and the like, are used in the sense of 'legal residence'; that is to say, place of *domicile or permanent abode*, as distinguished from temporary residence," citing numerous authorities.

Where a citizen and resident of Florida obtained government employment in the District of Columbia and moved from Florida to the district for the purpose of carrying out such employment it was held that there was no change in his legal domicile, habitation, residence and home, for the purpose of registering as a qualified elector and voting in Florida, although he, because of such employment, was then residing away from Florida during his said employment (*Dennis v. State*, 17 Fla. 389, text 401). "Temporary residence, even if long, merely for the purpose of transacting business or engaging in employment for the sake of health or pleasure, with the intention of returning to the original home, is not sufficient for the acquisition or change of domicile." (28 C. J. S. 19, §11). In this connection see also Annotations in 35 A. L. R. 139, et seq., 129 A. L. R. 1392, et seq., 12 A. L. R. 2d 773, et seq., and 36 A. L. R. 759, 772 and 778; *Robinson v. Fix*, 113 Fla. 151, 151 So. 512; *Reckling v. McKinstry*, 185 Fed. 842, text 843; *Fowler v. Fowler*, 156 Fla.

316, 22 So. 2d 817, text 818; Hillsborough Investment Co. v. Wilcox, 152 Fla. 889, 13 So. 2d 448, text 450; Collins v. Collins, 150 Fla. 374, 7 So. 2d 443, text 444; Matthews v. Jeacle, 61 Fla. 686, 55 So. 865, text 867; Murphy v. Farquhar, 39 Fla. 350, 22 So. 681.

When said §1, Art. VI, and §7, Art. X, are considered in the light of their history, purpose, and intention, and the above cited and quoted authorities, it is evident that the phrase "habitation, domicile, home and place of permanent abode in Florida," as used in said §1, Art. VI, is more limited in its scope than is the phrase "makes the same his or her permanent home," as used in said §7, Art. X; the first is used to evidence citizenship and domicile in this state, the latter to evidence mere residence in this state. There may be, under proper background and circumstances, a separate voting residence and residence for the purpose of homestead tax exemption. Only where there are unusual circumstances may they be different; under ordinary circumstances they are the same.

The above question is, therefore, answered in the affirmative; however, with the warning that where homestead tax exemption is applied for in a location different from the voting residence care should be taken that there is a legal reason for the difference.

058-125—April 9, 1958

CRIMINAL PROCEDURE

VALIDITY OF JOHN DOE WITNESS SUBPOENA

To: *J. Louie Carter, Clerk, Criminal Court of Record, West Palm Beach*

QUESTION:

Is a witness subpoena valid when issued and served upon a person to appear before the county solicitor in an investigative proceeding entitled "The State of Florida v. John Doe"?

The copy of the subpoena form transmitted with your letter shows that same is styled "The State of Florida v. John Doe," but the witness is summoned by his correct and proper name.

The name "John Doe" is, and for some centuries has been, used in legal proceedings as a fictitious name to designate an individual until his real name can be ascertained (see *State v. Rossignol*, 153 Pac. 2d 882).

The validity of this type witness subpoena was upheld in *State v. Keliher*, 194 N.W. 657, wherein the court held that John Doe proceedings by a prosecuting attorney for examining witnesses brought before him was no violation of a prospective defendant's constitutional rights as such action did not interfere with the defendant's preparation for trial, or prevent him from securing witnesses in his own behalf.

I doubt that it is necessary that a witness subpoena for purely investigative purposes name any person as defendant, whether by his correct name or by a fictitious name. There is usually no charge of crime at the time a witness is subpoenaed before the county solicitor and where there is no charge of crime there is no defendant to be named.

It is therefore apparent that a defendant or a person under investigation would have no right to contest the validity of such

subpoena in this state.

Upon receipt from the county solicitor of a praecipe for witness subpoena comparable to the one enclosed, the clerk is required by law to forthwith issue same, assuming said praecipe to be in due and proper form and sufficient upon its face.

058-126—April 14, 1958

LEGISLATURE

INTERIM LEGISLATIVE COMMITTEE—EXPENSES—HCR
1964, 1957; §§11.12, 11.13, 11.24 AND 112.061(1), (4) (a), F. S.

To: *Joint Interim Committee on Conservation, Fort Myers*

QUESTION:

May the joint legislative committee, appointed pursuant to house concurrent resolution 1964, of 1957, employ persons to assist it, by gathering data and facts for the said committee and otherwise, to be paid from the general legislative appropriation?

The validity and authority of interim legislative committees provided by resolutions instead of acts of the legislature in this state are subject to serious question (81 C. J. S. 959-60, §42; 49 C. J. 259, §41, notes 10-14; and annotations in 28 A. L. R. 1155-1159, and in Ann. Cas. 1916 B, 1147-8); however, such is a question of constitutionality which this office has consistently left to the courts.

Presuming the validity of the committee, but not deciding the same, we are confronted with §4, Art. IX, State Const., which provides that "no money shall be drawn from the treasury except in pursuance of appropriations made by law." Our supreme court (Advisory Opinion, 43 Fla. 305, 31 So. 348; Advisory Opinion, 156 Fla. 45, 22 So. 2d 397; Advisory Opinion, 156 Fla. 48, 22 So. 2d 398; Advisory Opinion, 158 Fla. 872, 30 So. 2d 377; Advisory Opinion, Fla., 55 So. 2d 99) has held that appropriations from the state treasury may not be made by resolution of either or both houses of the legislature, only by legislative acts. Any attempt of house concurrent resolution 1964, of 1957, to make an appropriation is void. This being true, we must look to the statutes and acts of the legislature for the authority to pay employees and appointees of the committee from the state treasury.

In item 37, §1, Ch. 57-424 (general appropriations act), provides that "*Members of interim committees authorized by law or concurrent resolutions of either branch of the legislature shall be paid per diem and mileage as provided by §11.13, F. S. Section 11.13 (3), F. S., provides that "Members of any interim committee authorized by bill or concurrent resolution to receive per diem and expenses shall be paid per diem and expenses as authorized by section 112.061, subsections (1) and (4) (a), Florida Statutes," said per diem and expenses to be paid "out of legislative expense appropriation as provided in section 11.12." We find nothing in the statutes or acts of the legislature authorizing the payment from the state treasury of the expenses contemplated by the above question.*

The above question is, therefore, answered in the negative. However, your attention is directed to §11.24(5), F. S., as a possible source of assistance.

058-128—April 14, 1958

CRIMES

GAMBLING—STATE LOTTERY LAWS—GAME OF "SCUNK"

To: *R. M. Witherspoon, County Judge, Franklin County, Apalachicola*

STATEMENT OF FACT:

A drive-in theatre operator proposes to issue certain cards to its adult patrons for their participation in a game to be played at the conclusion of the movie feature.

The game, although entitled "Scunk," is played in practically the same manner as is the commonly known variations of bingo. Certain numbers are to be flashed upon the projection screen and announced over the theatre speaker system. The first patron that presents a card with a complete row of five announced numbers in any direction, which corresponds with the numbers announced, becomes eligible to answer a "serious" question concerning the geography of West Florida. If the question is answered correctly, the patron is paid a certain "announced amount of money." Only one patron is eligible per night and only one opportunity is given to answer the question propounded.

QUESTION:

Does the above scheme constitute a violation of the lottery laws of Florida?

It is well settled that there are three elements to a lottery, viz: (1) a prize, (2) an award by chance, and (3) a consideration.

It is apparent that the element of a prize is present in the scheme outlined.

It is also apparent that the element of consideration presents itself in said scheme, in that the opportunity to participate in said scheme would obviously be an additional inducement to the general public to patronize the theatre, thereby enhancing the value of this business to its owner (see *Little River Theatre Corp. v. State ex rel Hodge, Fla., 185 So. 855*).

However, I cannot be quite so definite with respect to the remaining element of "an award by chance." Under the various decisions, there can be no lottery unless chance predominates in the final determination of the recipient of the prize involved.

An unequivocal answer to your query is therefore difficult in the absence of more specific knowledge as to the nature of the proposed questions to be utilized in this scheme. If the questions are such that the answers are obvious, or if the management of the theatre either directly or indirectly assists the selected patron in arriving at the answer, then the essential element of chance is present, because in substance, the determination of the winner reverts back to the winner of the "Scunk" game, and the "question" element becomes mere subterfuge. Analogous to the proposed questions concerning the geography of West Florida, such a question as "For what animal is Dog island named?" would be sufficiently frivolous to remove the scheme from the arena of skill and education.

On the other hand, if the question should be so technical or otherwise difficult that the answer is beyond the capacity of the general public and answerable only by an expert, then the element of chance predominates, as the average person would be re-

stricted to pure guesswork in his answer. Such a question might be: "What is the average annual weather temperature of Leon County?" or "What is the perimeter in feet, of Lake Talquin?" Either of the extreme examples set forth above, if utilized in the proposed scheme, would satisfy the necessary element of chance to constitute a lottery.

However, if the questions which are asked require skill or judgment in order to correctly answer them, and are not beyond the capacity of the general public to answer, then the element of chance would not predominate, because the determination of the winner would not depend upon the chance of whether the numbers called out by the announcer corresponded with those theretofore placed by the participant upon his card or upon guesswork. In such a situation, the scheme would not be a lottery.

058-129—April 15, 1958

PUBLIC LANDS AND PROPERTY

PROPOSED BREAKWATER JETTY IN BREVARD COUNTY,
POWER PLANT—CITY OF ORLANDO—REQUIREMENTS
OF TRUSTEES OF II FUND—§§253.122 AND 253.126, F. S.

To: *Van H. Ferguson, Director, Trustees Internal Improvement Fund, Tallahassee*

QUESTIONS:

1. Does §253.126, F. S., exempt a municipality from complying with the bulkhead requirements of §253.122, F. S., when such fill is outside of the municipal limits and the county in which the municipality is located?

2. Must a municipality comply with the trustees' action of March 25, 1958, which requires a permit from the trustees before constructing groins or other structures upon sovereignty water bottoms, when the municipality purposes to construct a jetty on breakwater 2,000 feet into navigable waters?

AS TO QUESTION 1:

Section 253.126, F. S., provides that construction or extension by any state, county, city or other political subdivision is exempt from the limitations and restrictions imposed upon the construction or addition to existing lands or islands, where it is the riparian upland owner or holds the written consent of the upland owner. The statutes require the extension to be for a public purpose.

In opinion 057-362, dated Nov. 18, 1957, I held that a municipality does not have to comply with the notice requirements of Ch. 57-362. I based this opinion on §6 of the act, which is §253.126, F. S.

I assume for purposes of this answer that the city of Orlando is the riparian upland owner or has the written consent of the upland owner. Under this assumption, it is necessary to determine whether or not a municipality is exempt from the requirement of having a bulkhead line established prior to any construction, and if so, does this apply when the land is outside the corporate limits of the municipality:

The limitations and restrictions imposed upon the construction or extension of lands are contained in §253.123, F. S., which provides that no person shall construct or extend lands without first

complying with §253.122, F. S. Section 253.122 sets forth the procedure for establishing a bulkhead line where one does not exist, or re-establishing an existing bulkhead line. I am, therefore, of the opinion that a municipality is exempt from the requirements of §253.122, when it is the riparian upland owner or has the written consent of the upland owner, when the construction is for a public purpose, and when the property is within the municipal limits.

The provisions of §253.126, F. S., do not specifically require the submerged land to be within the municipal limits, or even within the county. The only requirement is that the municipality act in a governmental or proprietary capacity and the extension must be for a public purpose. The section clearly provides that the limitations of the act so far as bulkhead requirements are concerned shall not apply to *any* state, county, city or other political subdivision. I am, therefore, of the opinion that a municipality is exempt from the bulkhead requirements of Ch. 57-362, when it is the riparian owner or has the written consent of the riparian upland owner, even though the submerged land is outside of the municipal limits or even out of the county. No attempt is made to discuss the question of whether or not the municipality has power under its charter or appropriate ordinance to construct the utility.

Nothing in this opinion should be construed as indicating a municipality or other political subdivision can construct a fill in the submerged waters of the state without first acquiring title from the state, either by deed from the trustees of the internal improvement fund or by legislative act. The exception of counties, municipalities, and other political subdivisions from the requirements of Ch. 57-362, applies only to the bulkhead requirements of said act.

Question 1 is answered in the affirmative.

AS TO QUESTION 2:

The trustees of the internal improvement fund on March 25, 1958, approved a program to regulate by state permits installation of groins or other structures upon sovereignty water bottoms. The purpose of this action is to prevent obstruction of public access to foreshores and beaches, and to prevent harmful projections which deflect currents and cause erosion of beaches. By the trustees' action it becomes necessary not only for the applicant to obtain a permit from the U. S. corps of engineers, but also a permit from the trustees to be issued only upon proof of upland ownership, plus a report from the coastal engineering laboratory of the university of Florida. The report from the coastal engineering laboratory will show the probable beneficial or harmful effect of the installation, and give the trustees information upon which to act on the proposed permit. Nothing contained in the trustees' action indicates that they intended to exclude municipalities or other political agencies from the operation of these requirements. On the contrary, the program is to insure protection for the general public as well as other riparian owners, and if a municipality by such construction will interfere with this purpose, they are subject to the regulation. I am, therefore, of the opinion that a municipality must comply with the requirements of the trustees' action of March 25, 1958, the same as private citizens.

Question 2 is answered in the affirmative.

058-130—April 17, 1958

**AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY
STATE AGRICULTURAL MARKETING BOARD—AUTHORITY
TO ESTABLISH SERVICE STATION ON SANFORD STATE
FARMERS' MARKET—CH. 603, F. S.**

To: State Agricultural Marketing Board, Winter Haven

QUESTION:

Does the state agricultural marketing board have authority to construct, or lease property to others upon which to construct, a motor vehicle service station upon the Florida state farmers' market at Sanford?

The legislature in 1917 (Ch. 7315, 1917) established, within the department of agriculture, a marketing bureau, evidently designed to aid and assist producers of fruits, vegetables and other farm products in finding markets for their products and to give such persons better information as to the price they should receive for such products. In 1927 (Ch. 12292, 1927) provision was made for state inspection of such fruits, vegetables and other farm products and the issuance of certificates evidencing such inspection. The same year (Ch. 12056, 1927) provision was made for recognizing like certificates issued by the federal government. In 1929 (Ch. 13809, 1929) the state agricultural marketing board was created and established, the duties and powers of which included instruction in "standardization, grading, packing, processing, loading, refrigeration, routing, diversion and distribution of farm products." This statute provided other aids to producers of fruits, vegetables and other farm products in connection with their production, gathering, processing, sale, etc., all clearly designed to aid and assist such producers.

It clearly appears from the above and foregoing comments, and from the provisions of Ch. 603, F. S., as a whole, that the state agricultural marketing board, as well as the several Florida state farmers' markets established and constructed under and pursuant to said Ch. 603, were established and exist as aids to producers of fruits, vegetables and other farm products designed to enable them to better market their products and to receive the best possible income from their farming operations. The powers and authority of the marketing bureau, as well as the state agricultural marketing board, are limited by reason of the purposes aforesaid, which must be taken into consideration when construing statutes and laws relating to the powers and authority of the said agricultural marketing board. The farmers' markets established under and pursuant to the said statutes and laws exist primarily for the benefit of the farmers of the state and secondarily, for the general benefit of the state. When the farmers receive higher prices for their products the state as a whole benefits, as well as the farmers.

Among the powers and authority granted the board by the statutes and laws of this state is the right "to acquire suitable sites and erect thereon necessary marketing facilities, livestock pens and properly equip, maintain and operate same for the handling of all staple field crops, fruits and vegetables, poultry and dairy products, and all farm and home products, and for selling and loading livestock, and to let or lease space therein and

thereon . . ." (§603.16, F. S.). The board is also "authorized and empowered to sell, exchange, convey or otherwise dispose of any land, real property or personal property owned or held by said board *when, in the judgment of said board, such property is not needed for the purposes for which said board was created . . .*" (§603.19, F. S.). Sections 603.20-603.23, F. S., provide for the construction of buildings to be used "in the promotion of agriculture and livestock industry and as office space for agricultural agents." (Emphasis supplied.)

The above authority to let or lease space on farmers' markets established by the board is necessarily limited to the proper operation and maintenance of the said markets for these purposes and such leases must have a direct connection with the operation of such markets and the purposes for which established. Operations and functions performed under such leases and by the lessees must be designed and carried out for the assistance and benefit of the persons, firms and corporations using such markets, either as producers of fruits, vegetables and other farm products, or as purchasers of such fruits, vegetables and other farm products. It is the primary duty and obligation of such lessees to serve such producers and purchasers and their agents and employees; however, this does not seem to prevent the rendering of service to the general public so long as such services do not interfere with the primary duty to serve the said producers and purchasers.

The power and authority of the board, under §603.19, F. S., "to sell, exchange, convey or otherwise dispose of any land, real property or personal property owned and held by said board, *when, in the judgment of said board, such property is not needed for the purposes for which the said board was created,*" (emphasis supplied) is a limited one which must be exercised with care and caution. It probably relates primarily, if not entirely, to properties once used or intended to be used for a farmers' market but which is no longer suitable for such use and for which there is no reasonable expectation that such property will in the future be suitable for such use. The question of whether or not such property is no longer needed for the purposes of the board is one for the board itself and not its employees or agents; it is one that should be determined by the board while in session. This section probably relates to abandoned markets, or abandoned portions of markets for which there can be no reasonable expectation of future use as a farmers' market. The powers of the board to lease or let space on farmers' markets (§603.16, F. S.) or to sell property no longer needed (§603.19, F. S.) are limited powers subject to a strict construction.

We come now to the question of the power of the state agricultural marketing board to lease or sell space on a farmers' market in this state to some person, firm or corporation to be used as a motor vehicle service station. Only where a service station is needed for the use and benefit of persons, firms and corporations using a farmers' market, either as a necessity, accommodation or convenience, may the same be established on the grounds of a farmers' market. The primary purpose and duty of a service station on a farmers' market must be the accommodation and convenience of persons, firms and corporations using the market, either as producers of fruits, vegetables and other farm products or of purchasers of such fruits, vegetables and other farm products and their agents and employees. Any use of such a service station by the public

generally must be a secondary use and not the primary use, and users of the market must be given priority by such service station. Such a service station must exist for the primary use of patrons of the market and only secondarily for the use of the public, and the same rule would apply to other similar facilities on the markets. In the establishment of such a service station on a market, due regard should be had for the future expansion and use of the market and increased demands on such a service station in the future by the users of such market may be taken into account. Should a facility be established with a use expectancy of 10, 15 or 20 years, or any other period of time, due account should be taken of the possible demands on such a service station by the users of the market during such time. *Such a service station must be established primarily as a service to the users of the market and not as an income producing facility of the board, although a reasonable rental must be demanded for the space used by the service station.*

In the light of the above and foregoing statutes and observations, we feel that the above question may be answered in the affirmative, provided the requirements set out in this opinion are complied with by the board in leasing such a facility or space for the establishment of such a facility. The provisions of §603.19, F. S., would seem to have little, if any, application to the establishment of a service station on an active farmers' market. Any lease made in this connection should contain ample enforcement provisions to insure the operation of such a service station primarily for the benefit of persons, firms and corporations using the market upon which established.

058-131—April 17, 1958

STATE OFFICERS AND EMPLOYEES

MILK COMMISSION—PUBLIC EMPLOYMENT—ADDITIONAL COMPENSATION—CONSTRUCTION OF §§501.03 AND 216.171(4), F. S.

To: *Dexter Lowry, Administrator, Florida Milk Commission, Tallahassee*

QUESTION:

Are the members of the milk commission who represent the state board of health and the state department of agriculture entitled to receive the compensation provided in §501.03, F. S., for other members of the commission?

The compensation prescribed by law for the performance of the duties of any public employment is presumed to be adequate and just for the proper performance of the duties of such employment. Such legal presumption persists even though, from time to time, additional duties or functions of the employment are added without an accompanying increase in compensation. However, in the absence of a constitutional inhibition, the legislature may provide additional compensation for the performance of additional duties by a person holding public employment (see 43 Am. Jur., Public Officers, §363).

In light of the foregoing observation, and the provision of §501.03, F. S., that "members of the commission shall receive the sum of ten dollars per day for attendance at board meetings of

the commission," and the fact that the state board of health member and the department of agriculture member are both members of the commission, I see no legal objection to their receiving the \$10 per day authorized. This is subject, however, to compliance with the following provision of §216.171(4), F. S.:

No person may hold more than one employment, or receive compensation simultaneously from more than one appropriation from any funds in the state treasury or other state funds, *except by and with the consent and approval of at least five members of the state budget commission.* (Emphasis supplied.)

In this regard see opinion 053-139, rendered by this office on June 30, 1953, relating to the dual employment of public officers and employees.

Your question is answered accordingly.

058-132—April 17, 1958

TAXATION

VETERANS TAX EXEMPTION—CONSTRUCTION OF §§192.111 AND 192.112, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is the tax exemption, as provided, restricted to the unit occupied and adapted to the use of the qualified veteran, when such person owns the apartment house or duplex and rents the other unit or units for the purpose of deriving an income therefrom?

2. Would a swimming pool be included within such exemption?

3. Is there any limit on the valuation of property which may qualify for the tax exemption?

4. Is it the duty of the tax assessor, before allowing the tax exemption, to inspect the premises for the purpose of determining whether or not the property has on it "specially adapted housing"?

At the outset, it may be well to state general principles of law applicable to the questions presented above. Judicially it has been settled that veterans as a class may properly be made special objects of the legislative favor, within constitutional limitations (see 56 Am. Jur., Veterans and Veterans Acts, §9). It has also been generally held that the statutes exempting property of veterans from taxation are to be construed strictly against the exemption (see 84 C.J.S., Taxation, §241).

The statutes granting tax exemptions to disabled Florida veterans, and applicable to the above enumerated questions, read as follows:

192.111 Exemption for disabled veterans known as paraplegics.—

(1) Any real estate used and owned as a homestead by an ex-serviceman, honorably discharged with service connected disability and who has a certificate from the government or United States veterans' administration, or its successors, certifying that the ex-serviceman is receiving or has received special pecuniary assistance due to disa-

bility requiring specially adapted housing and classed as a paraplegic, shall be exempt from taxation.

(2) The production by an ex-serviceman of a certificate of disability from the United States government or United States veterans' administration before the tax assessor of the county wherein his property lies, shall be prima facie evidence of the fact that he is entitled to such exemptions.

192.112 Exemption for disabled veterans confined to wheel chairs.—

(1) Any real estate used and owned as a homestead by an ex-serviceman, honorably discharged with service connected total disability and who has a certificate from the government or United States veterans' administration, or its successors, certifying that the ex-serviceman is receiving or has received special pecuniary assistance due to disability requiring specially adapted housing and required to use a wheel chair for his transportation, shall be exempt from taxation.

(2) The production by an ex-serviceman of a certificate of disability from the United States government or United States veterans' administration before the tax assessor of the county wherein his property lies, shall be prima facie evidence of the fact that he is entitled to such exemptions.

AS TO QUESTION 1:

Applying the principle of strict construction against the exemption to the words in both statutes "Any real estate used and owned as a homestead" it appears that the 1st question should be answered in the affirmative. The extent of a "homestead" for the purpose of homestead exemption under the constitution is outlined in §1, Art. IX thereof. However, inasmuch as the exemption provided by §§192.111 and 192.112, F. S., are not homestead exemptions, such delineation is inapplicable. The word "homestead" is used in §§192.111 and 192.112 in its general or popular sense (See *Hopkins v. Grimes*, 14 Iowa 73). The use of a homestead in this sense does not contemplate its use for the purpose of deriving a profit or income therefrom (*Murphy v. Hunt*, 75 Ala. 558; *Lehman v. Bryan*, 67 Ala. 558; *McConnaugh v. Baxter*, 55 Ala. 379). It means the seat or mansion and embraces the idea of actual occupancy. The homestead must be used and kept as such. (*Cushman v. Davis*, 64 Atl. 456. See also *Anderson Mill & Lumber Co. v. Clements*, 134 So. 588).

AS TO QUESTION 2:

Again, applying the usual and general sense of the word "homestead," the answer to the 2nd question would depend upon whether the swimming pool is being used for the benefit of the veteran or whether it is being used for the purpose of deriving a profit or income therefrom. If for the latter purpose, I do not believe the exemption would apply.

AS TO QUESTION 3:

The 3rd question presented above is answered in the negative as to "any real estate used and owned as a homestead," in the sense contemplated in the answers to questions 1 and 2, inasmuch as the term "any" implies no limit to qualified property (see 3 A Words and Phrases 55).

AS TO QUESTION 4:

The answer to the 4th question depends upon the meaning of the term "prima facie evidence" as it is employed in the 2nd paragraph of §§192.111 and 192.112, *supra*. This term in its application to other matters has received considerable attention from judicial authorities throughout the several states. Perhaps the most reasonable and terse definition of the term, and one which comports with the numerous cases relating thereto, is found in 33 Words and Phrases, wherein on p. 549 thereof is contained:

Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.

In light of the foregoing general understanding of the term, I believe it would be proper to presume that the legislature intended the certificate of disability referred to in the 2nd paragraphs of §§192.111 and 192.112 to be sufficient proof upon which the tax assessor could allow the tax exemption. This does not mean, however, that the tax assessor could not deny such exemption if, upon his investigation, facts were disclosed which militated against the exemption.

Your questions are answered accordingly.

This opinion does not relate to the application of homestead exemption on apartment houses and duplexes, inasmuch as such questions have been thoroughly discussed in previous opinions of this office (See A. G. Op. 057-144, dated June 6, 1957).

058-133—April 17, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COMPENSATION OF COUNTY OFFICIALS—FEE OF CLERK
OF CIRCUIT COURT IN NATURALIZATION PROCEEDINGS—
§§145.03 AND 145.05, F. S.**

To: W. C. Baggett, Clerk Circuit Court, Ft. Pierce

QUESTION:

Is the fee received by the clerk of the circuit court in connection with naturalization proceedings, income of the clerk's office which must be reported and accounted for as income of the office?

The circuit courts of the state are naturalization courts with power to naturalize persons resident within their jurisdiction (Title 8, §1421, U.S.C.A.).

In connection with naturalization proceedings in the Florida circuit courts, the clerk of said court is required to charge certain fees, and to account for and pay over to the attorney general of the U. S. one-half of all such fees collected up to the sum of \$6,000. All fees in excess of \$6,000 collected by the clerk in naturalization proceedings in any fiscal year, must be turned over to the attorney general of the U. S. (Title 8, 1455 U.S.C.A.).

Clerks of state courts, who by state law were on a salary basis and were required to account for moneys coming into their hands, could not retain fees received in naturalization cases for their personal use (*Mulcrevy v. San Francisco* 34 S. Ct. 260, 231 U. S. 669, 58 L.Ed. 425). The above cited case has been held to clearly determine two points; viz, (1) that the fees received by the various clerks of the state courts in naturalization cases are com-

pensation for official acts, not personal ones; and (2), that such clerks are required to account to U. S. officers for one-half of such fees, and that the other one-half of fees retained by them are held by such clerks, subject to the laws of the respective states in which they may happen to be serving (*People v. Witzman* 109 N.E. 335, 268 Ill. 508).

A California county clerk could not retain fees collected in naturalization proceedings for his personal use (*Alameda County v. Cook* 162 p. 405, 32 Cal. App. 165).

Thus, it is well settled that federal laws intend the fee received by the clerk of the circuit court in connection with naturalization proceedings to be compensation for official acts of the clerk.

The clerk of the circuit court as a county fee officer is required to account for all fees or commissions received for his official services, to the board of county commissioners of the county in which he holds said office and all fees and commissions received by said clerk in excess of the expense of operating the clerk's office and his annual compensation as authorized by law must be turned over to the county (§§145.03 and 145.05, F. S.).

That the income of the office of the clerk of the circuit court includes the clerk's compensation for performance of any duty required of him as an official act, see *Orange County v. Robinson* III Fla. 402, 149 So. 604; *Carlton, for use of Duval Co. v. Fidelity Deposit Co. of Maryland* 113 Fla. 63, 151 So. 291, petition denied, 113 Fla. 63, 154 So. 317.

It is my opinion the portion of the fee authorized by federal law to be retained by the clerk of the circuit court in connection with naturalization proceedings, is compensation of the said clerk for an official act and, as such, must be accounted for as income of the clerk's office.

The question is answered in the affirmative.

058-134—April 18, 1958

CRIMINAL PROCEDURE

FORM OF EXECUTION FOR FINE AND COSTS—§921.15, F. S.

To: *J. Louie Carter, Clerk Criminal and County Courts, Palm Beach County, West Palm Beach*

QUESTION:

Will you please prepare and supply me with a suggested form for an execution for fine and costs pursuant to §921.15, F. S.?

The section in question provides as follows:

921.15 *Stay of execution of sentence to fine; bond and proceedings.*—(1) Persons convicted of crimes, who shall have a pecuniary fine or sum of money assessed or adjudged against them as punishment therefor, shall have the right on being taken into custody by the proper officer of the court, or prior to such arrest, to give bail for the payment of such fine and the costs of prosecution. Such bail shall be by bond, conditioned for the payment of the fine and costs, executed by the defendant and one or more good and responsible persons to be approved by the court, if in session at the time; otherwise by the sheriff or the officer

charged with the execution of the judgment.

(2) The bond shall be made payable in ninety days from the date thereof to the governor of this state and his successors in office, and if not paid at the expiration of the ninety days, the sheriff or other officer aforesaid shall indorse on the bond that default has been made in the payment, and having signed such indorsement, shall file the bond with the clerk of the court in which judgment was rendered, and the clerk shall forthwith issue execution for the amount of the fine and costs against the security or bail, as if there had been judgment at law on such bond, and the same proceedings shall be had as in cases of other executions, and the person convicted shall be liable to be proceeded against, as if no such bond had been given, until the same has been fully paid and satisfied.

I think that the following form of execution complies with said statute and that it may properly be used by you when the defendant has been sentenced to pay a fine and the costs of prosecution, to-wit:

IN THE CRIMINAL COURT OF RECORD IN
AND FOR PALM BEACH COUNTY, FLORIDA
STATE OF FLORIDA,
Plaintiff,

v.

Defendant.

THE STATE OF FLORIDA, TO ALL AND SINGULAR THE
SHERIFFS OF THE STATE OF FLORIDA, GREETING:

WHEREAS, pursuant to the conviction of the said defendant,
_____, in the Criminal Court of
Record of Palm Beach County, Florida, for the crime of _____

the said Court did on the _____ day of _____, 195_____,
sentence the said _____ to pay a
fine of _____ Dollars and the costs
of prosecution, taxed at _____ Dollars,
and in default of such payment to serve _____
in the county jail; and

WHEREAS, on the _____ day of _____, 195_____,
the said defendant gave bond, with _____
and _____ as sureties thereon,
for the payment of said fine and costs, payable ninety days after
said date, which bond was approved and accepted according to law;
and

WHEREAS, on the _____ day of _____, 195_____,
the sheriff of said county filed said bond with the undersigned
clerk of said court, bearing said sheriff's signed endorsement that
default had been made in the payment thereof;

NOW, THEREFORE, you are hereby commanded that of the
goods and chattels, lands and tenements of the said sureties,
_____ and _____,
you cause to be made the amount of said fine and costs, to-wit:
_____ Dollars; and that you have the
same before the Judge of our said Court, at the courthouse in West
Palm Beach, Florida, when satisfied, to satisfy the plaintiff, the
State of Florida, for said fine and costs; and have then and there
this writ.

WITNESS the Honorable Edward G. Newell, Judge, as also J. Louie Carter, Clerk, and the seal of said Court at the courthouse in West Palm Beach, Florida, this the _____ day of _____, 195_____.

(SEAL)

Clerk of said Court

Where no costs have been imposed as a part of the sentence the above form may be used if the several references to costs are stricken.

058-135—April 21, 1958

JUDICIARY DEPARTMENT

RECORDING OF LIS PENDENS—FEE, CLERK OF CIRCUIT COURT—§§28.21(10), 28.241(1) AND 47.49, F. S.

To: G. W. Roberts, Clerk Circuit Court, Lake City

QUESTION:

Does the flat filing fee of the clerk of the circuit court, as appears in §28.241(1), F. S., include a fee for filing and recording notices of lis pendens in the lis pendens docket?

The clerk of the circuit court is required to keep a lis pendens docket for the recording of all notices of lis pendens (§28.21(10), F. S.).

A notice of lis pendens is an instrument which may be filed with the clerk of the circuit court in connection with actions involving the ownership of, or interest in, property. It is intended to operate as constructive notice to persons dealing with the property that is the subject matter of litigation. It creates no particular interest in the property described in the notice, neither does it create any superior rights in that property for the litigant who files said notice (54 C. J. S. Lis Pendens, §38).

A notice of lis pendens is not an instrument entitled to recording under our recording statutes, rather it is something in the nature of a permissive adjunct to present litigation. Our statutes do not require a lis pendens to be recorded in those public records showing a particular interest in property but require a lis pendens docket to be kept by the clerk of the circuit court in the same manner as other progress dockets are kept.

Thus, a lis pendens is something in the nature of a pleading in connection with litigation involving property, which is intended to give notice to all persons that the property listed therein is the subject matter of court action.

No proceeding in any of the state or federal courts in this state, including actions at law, in equity and special statutory proceedings, shall operate as a lis pendens until a notice of lis pendens is filed with the clerk of the circuit court of the county in which the property is situate (§47.49, F. S.).

Under the above section notice of a lis pendens, in connection with an action in a state or federal court in this state, where the action is commenced in a county other than where the property designated in the notice of lis pendens is located, may be filed with the clerk of the circuit court of the county where the designated property is located. Under these circumstances the clerk of the circuit court is not entitled to receive the flat filing fee, as

provided by §28.241(1), F. S., therefore, the clerk is entitled to a regular recording fee for filing and recording of a notice of lis pendens.

Where the situs of the property, designated in the notice of lis pendens, is within the county where the action is commenced in a state court and a flat filing fee is collected by the clerk of the circuit court, it is my opinion that the flat filing fee collected by the clerk includes a fee for filing and recording a notice of lis pendens in the lis pendens docket.

Subject to the above qualifications the question is answered in the affirmative.

058-136—April 23, 1958

LAW ENFORCEMENT

REWARDS, AUTHORITY OF SHERIFFS AND DEPUTIES TO ACCEPT—CONSTRUCTION OF §838.06, F. S., PROHIBITING ACCEPTANCE OF UNAUTHORIZED COMPENSATION FOR PERFORMANCE OR NONPERFORMANCE OF DUTY

To: John A. Madigan, Jr., Attorney, Florida Sheriff's Ass'n, Tallahassee

QUESTIONS:

1. May a sheriff or his deputies accept rewards as a result of services performed which the duties of their office require them to do?
2. May rewards be accepted for services not required by the duties of the office of these officers?
3. What is the effect of §838.06, F. S., on the acceptance of rewards in criminal matters by sheriffs and their deputies?

The general question of rewards as it affects public officers was discussed by this office in an opinion on July 1, 1932 (1931-1932 Biennial Report 403) where it was said:

The general law, supported by numerous decisions of the Supreme Court of various states is to the effect that a promise by a private individual to reward a public officer for doing what it is his duty to do is not only void for want of consideration, but also because it is *contrary to public policy* . . . These courts hold that it is not only against public policy, but that it is illegal for a sheriff or a deputy or constable or a jailer or a policeman or a peace officer, or other official to accept a reward for the performance of service when the services are within the scope or line of his official duty and his compensation therefor is fixed by law. (Emphasis supplied.)

. . . I find the general law to be that some of the cases make a distinction between the right of an officer to take a reward from a private individual for the performance of his official duty and his right to such a reward when offered by statute holding that in the latter case he is entitled to take the reward where the statute is sufficiently liberal to comprehend the services of the officer . . .

It seems clear that the general policy of the law is against officers accepting rewards for the performance of official duties, and that unless the statute is clear on the

subject that they are not only not entitled to accept them, but that they are illegal.

The rule is otherwise where the officer performs services outside the scope and line of duty for which a reward is offered. In this instance, public policy does not forbid his claiming the reward (77 C. J. S., Rewards, §36, p. 381).

In light of the above stated public policy, §838.06, F. S., as it affects such rewards, must be considered. This section deals primarily with the unlawfulness of officers accepting unauthorized compensation for performance or nonperformance of their duties. The last portion of that section reads:

... provided, that nothing herein shall be construed so as to preclude a sheriff or his deputies, city marshal or policeman from accepting rewards or remuneration for services performed in apprehending any criminal.

This provision was discussed in an opinion by this office, dated Feb. 5, 1918 (1917-1918 Biennial Report 405). In interpreting §4, Ch. 5416, 1905, which is a verbatim statement of the above-cited portion of §838.06, it was said:

It would appear from the above provision of law that in this state the officers mentioned may receive rewards or remunerations for services performed in apprehending criminals. (Emphasis supplied.)

This interpretation was adhered to by inference in opinion 043-224) A. G. O. 1943-1944, p. 116), dated Aug. 23, 1943.

In light of the foregoing, it can be said that public policy generally forbids the acceptance by sheriffs and their deputies of rewards for services performed which are within the scope of their office. Where the service performed is not within the scope and line of duty then a reward can be accepted. A reward can also be accepted, as a result of §838.06, F. S., by a sheriff or his deputies for services performed in apprehending criminals.

058-137—April 23, 1958

TAXATION

DOCUMENTARY STAMP AND INTANGIBLE TAXES—INSTRUMENTS, FINANCING UNDER §1715e, TITLE 12, U. S. CODE

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What instruments, notes, mortgages and documents used in connection with the financing of housing projects under and pursuant to §1715e, title 12, of the U. S. code, are subject to Florida documentary stamp taxes and intangible personal property taxes?

Section 1715e, title 12, of the U. S. code, provides a novel type of government insured financing for housing projects. Under this section the federal housing commissioner is authorized to insure mortgages issued in connection with the purchase of housing from nonprofit corporations or nonprofit trusts as provided in and by said section. Under this plan the nonprofit corporation or trust is organized for the purpose of constructing or causing to be constructed housing for the stockholders, members or beneficiaries of the said corporation or trust. Persons

desiring to obtain housing under this section organize the corporation or trust, which in turn arranges for the financing of the housing project, contracts for the construction of the housing project by a contractor or contractors of its selection. The corporation or trust arranges with the federal housing commissioner for insuring the mortgage or mortgages necessary for raising funds for constructing the project and obtains from the commissioner a commitment for the insurance of the contemplated mortgage or mortgages.

When mortgage insurance commitments have been obtained the corporation or trust enters into a contract with some builder for the construction of the housing project, who, relying upon the said commitment or commitments for mortgage insurance, obtains a construction loan which is used to finance the construction of the project. The title to the lands upon which the housing project is to be constructed is taken in the name of the corporation or trust, or the contractor, who, on the strength of the insurance commitment, obtains a construction loan which is secured by mortgage upon the real property upon which the housing project is to be located. Documentary stamp taxes and intangible personal property taxes are paid upon this obligation and mortgage; no question is raised as to these taxes.

When the housing project is completed and ready for occupancy the nonprofit corporation or trust, being vested with title or obtaining title thereto, issues its obligation instruments, in the amount to be secured by the insured mortgage, and secures the same with a mortgage encumbering the entire housing project. This is a temporary financing to permit the transfer of title from the nonprofit corporation or trust to the stockholders, members or beneficiaries of such corporation or trust; this being the method used to vest title in the said stockholders, members or beneficiaries as purchasers of the said housing projects. Upon being vested with title the said purchasers issue their promissory notes, in the amount of the unpaid portion of the consideration paid for the property purchased by them, and secure the same with a first mortgage upon their said property, which mortgages are insured in accordance with §1715e, title 12, U. S. code. The above mentioned blanket mortgage is then satisfied and canceled of record, if recorded. The said nonprofit corporation or trust is then without title to the said property and by the terms of their charter or trust agreement terminates and ceases to exist.

The nonprofit corporation or trust in effect held title to the housing project and the several units therein in the nature of a trust for its stockholders, members or beneficiaries; they seem to be the real parties in interest. The sum total of the individual notes and mortgages equals in amount and security the temporary notes and mortgage, given in fact as a plan of transferring legal title from the corporation or trust to its stockholders, members or beneficiaries. The individual notes and mortgages are in the nature of temporary transactions to facilitate the closing of the transactions; they take the place of and replace the temporary notes and mortgages. The temporary conveyance, notes and mortgage, together with the individual deeds, notes and mortgages, make up the closing documents and papers.

Actually the individual notes and mortgages are intended to, and do, take the place of the note and mortgage given by the

corporation or trust and are in the nature of a renewal or extension thereof. Although the makers of the individual notes were not personally obligated on the original note, their property, after they acquired title to the same, was or would be liable under the lien of the mortgage. "As a general rule, entering satisfaction of a mortgage and taking a new one, when designated by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or part of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor . . ." (59 C. J. S. 342, §281). To the same effect see also *Federal Land Bank v. Godwin*, 107 Fla. 537, 145 So. 883, text 885. The general rule is, in the absence of an agreement or understanding otherwise, "that the acceptance by the holder of a negotiable bill or note of a renewal or new bill or note in the place thereof does not of itself constitute a payment of the original instrument, even though the new instrument is signed by additional parties . . ." (10 C. J. S. 977-8, §444). "The execution of a note in renewal of a previous one is not payment of such prior note, nor the creation of a new indebtedness, unless there is an express agreement" otherwise (*Cheves v. First Nat. Bank*, 79 Fla. 34, 83 So. 870, text 872). The acceptance of the note of a third person in lieu of the original note will not constitute a payment of the original unless such was the intention of the parties (10 C. J. S. 979, §444). "There may be a change of the parties or an increase of security, but there is no renewal unless the obligation is the same" (10 C. J. S. 758, §263). "Inserting name of new payee in renewal note does not change its character as a renewal note" (*Live Stock Nat. Bank v. Minnehaha State Bank*, 52 S. D. 172, 217 N. W. 180).

From the facts and circumstances reflected by the file before us, §1715e, title 12, U. S. code, and the above mentioned authorities, we conclude that the note and mortgage made by the nonprofit corporation or trust and the satisfaction thereof and the notes and mortgages made by the individual purchasers of housing units (the stockholders, members or beneficiaries of the corporation or trust) constitute a single transaction, with the said individual notes and mortgages in the nature of an extension of the note and mortgage made by the said corporation or trust. The consideration for the individual notes is the original note of the corporation or trust, or the indebtedness evidenced by it.

We, therefore, feel that the instruments made, issued and delivered by the nonprofit corporation and those made by their stockholders, members or beneficiaries, in order to comply with the federal statute and vest title of the individual housing units in the said stockholders, members or beneficiaries, are in truth and fact one transaction and should be taxed as instruments of a single transaction.

058-138—April 23, 1958

JUDICIARY DEPARTMENT

JUVENILE COURT—"DEPENDENT"—CONSTRUCTION OF
§39.01(1), (10), F. S.

To: Rufus O. Jefferson, Judge of Juvenile Court, Leon County,
Tallahassee

QUESTION:

Is a child who is living with and being properly cared for by grandparents or friends, without any assistance or support of the natural and legally responsible parents, a dependent within the contemplation of Ch. 39, F. S.?

As the opinion of the Florida supreme court stated, in *State of Florida ex rel R. L. Watson v. D. A. Rogers*, 86 So. 2d 645, at p. 648 thereof:

After all is said, the jurisdiction of the Circuit Court over minors as provided by Section 11, Article V, goes to bread and butter and the spiritual, while the jurisdiction of the Juvenile Court over them as conferred by Section 50, Article V, goes to criminality, delinquency, dependency or other form of parental neglect.

The opinion of the same court in *State ex rel Hendricks v. Hunt*, et al, 70 So. 2d 301, when referring to the juvenile court's jurisdiction over children who may be dependents, stated, at p. 305 thereof, that:

... resort may be had to section 39.01(1), Florida Statutes 1951, F. S. A., which has to do with the establishment of juvenile courts generally, to determine what constitutes a "dependent child."

The provision of §39.01(10), F. S., applicable to the question presented herein, reads as follows:

"Dependent child" means a child who . . . has not proper parental support, maintenance, care or guardianship; . . . or who is abandoned by the child's parent or *other custodian*; . . . or whose home, by reason of neglect, cruelty or depravity, or other adverse condition, on the part of the parents, *legal custodians, guardians or other person* in whose care the child may be, is an unfit place for the child. (Emphasis supplied.)

It is clear from a reading of the foregoing provision of §39.01(10), F. S., particularly the italicized portions, that the determination of the existence of dependency does not result from a consideration of the fact of actual custodianship but is predicated on the inability or neglect of the custodian to maintain the child free from dependency. A "dependent" child is really a neglected child (see 6 M. L. Q. 2).

The appellate court of Indiana, in *Orr, et al v. State*, 123 N. E. 470, in deciding whether a child was "dependent" under a definition substantially similar to the definition in the Florida act, held that where both parents left the child with a grandparent, the child was not a dependent in the absence of a showing that the child was at any time a charge on the public, or that the child was ever "destitute, homeless, or abandoned." See also *Foxgruber v. Hansen*, 265 P. 2d 233; *Cullins v. Williams*, 160 S. W. 733; *Graham v. Gardner*, 137 N. W. 223; *Ex parte Adams*, 183 N. W. 241.

In light of the foregoing considerations we are of the opinion that the above question should be answered in the negative. This does not imply, however, that the natural and legally responsible parent may not be subject to criminal liability under §856.04, F. S., for not providing the means of support for the child or children.

058-139—April 23, 1958

TRANSPORTATION OF SCHOOL CHILDREN

SCHOOL BUSES—REQUIREMENT TO STOP FOR—CONSTRUCTION OF §234.04, F. S.

To: Ray E. Ulmer, Justice of Peace, Pinellas County, Clearwater
QUESTION:

Is a motor vehicle operator required to come to a full stop when traveling on a road which intersects a road upon which a school bus has stopped, at the entrance of the intersection thereof, before proceeding in front of such school bus?

STATEMENT OF FACTS:

In the instant case the school bus in question was proceeding easterly on a paved highway and came to a full stop at the intersection of the road with another highway running north and south. The school bus upon stopping displayed the usual stop signal for the purpose of discharging children. The defendant was proceeding south on the intersecting road and failed to stop in obedience to the statute but proceeded on through the intersection in front of the school bus.

The statute applicable to the above question is §234.04, F. S., and, where applicable, reads as follows:

Any person using, operating, or driving a motor vehicle upon or over the roads or highways of this state, *upon approaching* any school bus used in transporting school pupils to or from school, while such bus is stopped upon the roads or highways of the state, is required to bring such motor vehicle to a full stop *before passing* such school bus; . . . If a stop signal which meets standard requirements prescribed by the state board shall be displayed from the bus, said signal shall be due warning to the driver of any *approaching* vehicle that children may be on the highway and such vehicle shall not *pass* the school bus until the signal has been withdrawn. Any person failing to comply with the requirements of this section, or violating any of the provisions hereof, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed three hundred dollars or by imprisonment in the county jail not to exceed ninety days. (Emphasis supplied.)

If the ordinary and acceptable definition of the italicized words of the above-quoted statute were applied, your question would be answered in the affirmative.

A substantially similar question based upon a substantially similar statute was presented in *Fisher v. J. H. Sheridan Co. Inc.*, 189 S. E. 356. The supreme court of South Carolina, in its opinion in this case, in discussing the purpose of the statute,

stated that it "was made to prevent accidents and injury to school children who are about to enter or to leave such school bus on the highway. It is a mandate to the citizen how to operate his motor vehicle at such a place." Unquestionably, the Florida statute was created to serve the same function. The court predicated its conclusion, in part, upon the statement that: "the word 'pass' employed in the act means to go by, regardless of whether the school bus and the motor vehicle are traveling in the same direction or in opposite directions at the time when the school bus comes to a stop."

The court, in the Virginia case of *Carlton v. Martin*, 160 Va. 149, 168 S. E. 348, in passing upon a substantially similar question, stated:

A school bus while discharging or taking on school children is a warning of danger to automobile drivers. They are afforded, by its very presence, knowledge that small children may run across the street in front of their approaching automobiles, and they must operate their automobiles with a degree of care commensurate with the dangers to be encountered. The danger of injuring a child under such circumstances is increased, and the care to be exercised by drivers of automobiles in preventing an injury likewise is increased.

In concluding that your question should be answered in the affirmative, in light of the foregoing, this opinion does not overlook the admonition that penal laws should be strictly construed and, that when a doubt exists, it should be resolved in favor of the defendant (see *Watson v. Stone*, 4 So. 2d 700; *Gibbs v. Mayo*, 31 So. 2d 739).

058-140—April 23, 1958

INSURANCE

ANNUITIES IN RETURN FOR GIFTS OR DONATIONS—NON-PROFIT CHARTERED RELIGIOUS ORGANIZATIONS—
§635.201, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

May a nonprofit chartered religious organization provide life annuities to donors of "gifts" to the organization without being considered to be engaged in the business of insurance?

The consensus of the authorities is that an annuity contract is not a contract of insurance (see Vol. I, *Appleman, Insurance Law and Practice*, p. 76; Vol. 3, *C. J. S.*, p. 1375). The dominant and characteristic feature of an insurance contract is that for a stipulated consideration the contract provides an indemnity upon the occasion of a certain loss (*State v. DeWitt C. Jones Co.*, Fla., 147 So. 230). Under a contract of insurance an immediate hazard of loss is thrown upon the insurer. Under an annuity contract the hazard of loss is upon the annuitant; that is, upon the annuitant's death, payments cease. Annuity contracts, therefore, are essentially investments rather than insurance (*Daniel v. Life Ins. Co. of Va.*, Texas, 102 S. W. 2d 256).

By determining that an annuity contract is not a contract

of insurance, we do not determine that it is beyond the power of the state to regulate annuity contracts in the public interest. When an annuity contract is purchased from an insurance company or from another commercial concern it is in the public interest that the contract be fairly drawn and that adequate reserves be maintained to meet the obligations of the contract. The question, therefore, becomes one of the extent to which annuity contracts are regulated by legislation. Prior to 1957 there was no specific legislation regulating the sale of annuity contracts. Through the general regulation and control of insurance companies, which are the primary source of annuity contracts, there was a certain degree of regulation of this business. The 1957 session of the Florida legislature added §635.201, F. S., to the insurance laws of Florida. Section 635.201 provides for the inclusion of certain standard provisions in annuity contracts. Because of its position in the insurance laws and because of the policy expressed in said section, it is my opinion that said section applies solely to annuity contracts entered into by insurance companies or other commercial concerns.

It is my opinion that nonprofit charitable or religious organizations, subject to the limitations of their charters, may enter into annuity contracts with donors of "gifts" to said organizations and that the granting of such contracts does not constitute the business of insurance in this state.

058-141—April 23, 1958

CITIES AND TOWNS

INSURANCE—ANNUITY CONTRACTS—CHS. 175 and 185;
§§175.03, 175.11, 185.06, 185.16, and 185.19, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

In 1957 the legislature amended Chs. 175 and 185, F. S., to permit pension fund trustees to buy annuity and life insurance contracts to provide, in whole or in part, the benefits to which all participants are entitled. Cities having funds under these chapters are now being visited by insurance agents who wish to sell contracts to these funds.

1. Do these contracts take the place of the funds' responsibilities to the individual participants?

2. If a policeman's retirement fund purchases an insurance policy for a policeman with his contributions to the fund and the policeman leaves the force before accumulating ten years of service, must the fund refund to him 100% of his contributions notwithstanding the fact that the cash value of the insurance policy is less than his contributions?

3. Do the trustees of a fund possess the power to give an insurance policy to the fireman or policeman upon whose life the policy is issued?

AS TO QUESTION 1:

Section 175.11, F. S., defines the eligibility to and the amount of firemen's pensions and provides that those eligible "shall be entitled" to such pension. Section 185.16, F. S., dealing

with policemen's pensions provides that after completing a prescribed amount of service policemen are "entitled" to a certain pension. Section 175.03, F. S., and §185.06, F. S., which permit the trustees of these funds to invest in insurance and annuity contracts have no direct bearing on the rights of participants in the funds. If an insurance or annuity contract purchased on behalf of an individual participant is insufficient to provide the benefits provided by law, the fund remains responsible to provide the full benefits to which the participant is entitled.

AS TO QUESTION 2:

Section 185.19, F. S., provides that should any police officer leave the force before accumulating 10 years of service toward retirement, such officer *shall be entitled* to a refund of 100% of his contributions to the retirement fund. As stated above, §185.06, F. S., which permits the trustees of the fund to invest in insurance or annuity contracts has no direct bearing upon the rights of participants in the fund. A police officer, therefore, is entitled to a refund of 100% of his contributions to the fund when he leaves the force, notwithstanding the fact that an insurance contract purchased on his behalf with his contributions has a cash value less than his contributions.

It should be noted in this connection that there is no provision in Ch. 175, F. S., for refunds to firemen of their 2% contributions, and it was held in A. G. O. 051-169 (1950-51 Biennial Report, p. 267) that no such right to a refund exists.

AS TO QUESTION 3:

The trustees of retirement funds under Chs. 175 and 185, F. S., are the sole owners of any securities purchased with moneys contributed to the fund. Said trustees have no power to make gifts of these securities. They do, however, have the power to sell any securities owned by the fund. If it becomes advisable or necessary to dispose of an insurance or annuity contract owned by the fund, as for instance when a participant resigns or is relieved from his duty, the insurance contract could be sold to the participant. In the case of a policeman, the contract might be exchanged for a release of the policeman's right to a refund of his contributions.

058-142—April 23, 1958

INSURANCE

NONADMITTED CARRIERS—CIRCUMSTANCES UNDER WHICH COVERAGE MAY BE PLACED—§645.05(1); CH. 645, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

An insurance agent has a client's order to write a policy of insurance. No company, authorized to do business in this state, represented by said agent, is willing to accept this coverage. Although no admitted carrier has volunteered to write the coverage, said agent is aware of the fact that his client could obtain the desired coverage with an admitted carrier through another agent. Under such circumstances, may said agent obtain coverage for his client in a nonadmitted carrier?

Section 645.05, F. S., defines the circumstances under which insurance coverage may be placed with a nonadmitted carrier. Section 645.05(1) provides:

Any licensed supervisory general agent or any licensed agent under this chapter may place fire, casualty or surety insurance with a nonadmitted insurer under the following circumstances:

(a) That such insurance placed is of a type and kind that the supervisory general agent is authorized to process or which the licensed agent under his resident agent's license is authorized to sell; and

(b) That the licensed supervisory general agent or the licensed agent is unable to procure such insurance from any insurer licensed to engage in business in this state, represented by such agent; and

(c) That no insurer licensed to engage in business in this state but not represented by said agent, has offered or volunteered to accept such insurance.

It is not a prerequisite to placing insurance with a non-admitted carrier that no admitted carrier is willing to write the coverage. The requirements, described elsewhere as "meager," are only that no admitted carrier represented by the agent is willing to accept the coverage and that no other admitted carrier has *offered* to write the coverage. There is no requirement in Ch. 645, F. S., as it is now written, that an agent seek out admitted carriers not represented by him nor is it required that he give up business because he is aware that another agent could place the coverage with an admitted carrier represented by him.

Your question is answered in the affirmative.

058-143—April 23, 1958

TAXATION

RETURNS OF RAILROAD PROPERTY, RAILROAD ASSESSMENT BOARD—CHANGE IN RAILROAD ASSESSMENT BY BOARD OF EQUALIZERS—§§193.25 and 193.27; CH. 195, F. S.

To: *W. J. Ferguson, County Attorney, Columbia County, Lake City*
QUESTION:

If the railroad assessment board returns to the tax assessor of Columbia county, railroad and telegraph properties at a figure deemed by the county commissioners of Columbia county to be unreasonably low and discriminatory in relation to other values within said county, and less than such railroad properties have been returned in prior years, is there any restriction or prohibition against said county commissioners, while sitting as a board of equalizers, from raising said assessment of railroad and telegraph properties so as to bring railroad and telegraph properties in line with the values of other properties in Columbia county as determined by the board of county commissioners, sitting as such board of equalizers?

Section 193.27, F. S., provides that the board of county commissioners may equalize the assessment of real estate or personal property in their respective counties, and for that purpose may

raise or lower the value fixed by the county tax assessor of taxes. However, Ch. 195, F. S., provides for the creation of a railroad assessment board, and that the various railroad companies and others shall make returns to said board showing the length and value of railroad lines and the number and value of personal property and equipment used in the operation and maintenance of said railroads. Said chapter further provides that should the railroad assessment board have reason to believe that any returns so made do not give a complete and correct value of said railroad property, the railroad assessment board, after having given notice, shall assess the same from the best information the board can obtain. The board is authorized to make, or cause to be made, such studies and research of the value of railroads operating in Florida, and the value and assessment of other properties locally assessed by the several counties of the state, and the board shall use such information and data to the extent necessary and requisite for the proper and equitable administration of this law. All such studies and information shall be kept by the board in permanent form and shall be available for inspection to all interested persons.

Under §193.25, F. S., "the county assessor of taxes . . . shall meet with the board of county commissioners . . . for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing, and equalizing the assessment . . . The county assessor of taxes and the board of county commissioners . . . shall comply with the requirements of this section." "The board of county commissioners may equalize the assessment of the real and personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real property, or item or items of personal property."

Under the above statutes the "authority of the county commissioners is to equalize assessments as made by the tax assessor" only and they have no authority to make an original assessment themselves or to direct the tax assessor to make one (*Cooley v. Johnson*, 95 Fla. 946, 117 So. 111). The presumption is that the county board of equalization will correct an excessive valuation of property by the tax assessor if application and objection is made by the owner or his agent (*City of Tampa v. Palmer*, 89 Fla. 514, 105 So. 115, text 121). The statutes contemplate that individual complaints be filed by interested persons concerning tax valuations, and do not seem to contemplate that the equalization board act upon its own motion. "It is the duty of the county equalization boards to review assessments and to redress errors of judgment committed by tax assessors with respect to valuations of taxable properties appearing on the tax rolls. For this purpose such boards act quasi judicially, and their decisions are final where they are rendered pursuant to the essential requirements of law" (*Lee v. Booker & Co., Inc.*, 108 Fla. 534, 146 So. 546). "County commissioners have no general power in making tax assessments but only such special and limited power as is specifically conferred by statute to secure equalization of tax values" (*Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41). In effect the county board of tax equalization is an appeal board

from the action of the tax assessor in fixing the valuation of the lands assessed, whose powers are brought into action by the appeal or objection of the taxpayer to the assessment as made by the tax assessor. Such board does not appear to be authorized to act upon its own motion.

If the board of county commissioners is of the opinion that the ratio fixed by the railroad assessment board is out of line, it should offer proof as to the actual ratio of assessment to the full cash value of assessments of real estate as fixed by the county tax assessor.

In light of the above, the answer to your question would appear to be that the board of county commissioners of Columbia county, while sitting as a board of equalizers, would be without authority to raise or lower assessments of railroad and telegraph properties made by the railroad assessment board.

058-144—April 23, 1958

MOTOR VEHICLES

APPLICABILITY OF TRAFFIC ORDINANCES TO OFFENSES COMMITTED ON PRIVATE PROPERTY—§324.051(1), F. S.

To: A. J. Thomas, Jr., City Attorney, Starke

QUESTION:

Do municipal police officers have authority to investigate automobile accidents and make arrests in connection therewith for violation of municipal traffic ordinances when said automobile accidents occur on private property which is open to general and common use by the public?

In your letter you cite a gasoline station as an example of the property involved and while this opinion is written to cover that specific situation, the holding herein is also applicable to parking lots and the like where such areas are open to common use by the public.

Although the law relating to the invalidity of traffic ordinances and state traffic laws on purely private property is well established, the law relating to law enforcement in quasi public areas is equally well settled. A New York court upheld the validity of a parking ticket issued on a private way which was open to general use by the public (*People v. Garland*, 84 N. Y. S., 2d 72). In *Gulich v. Paine*, 231 N. Y. 311, 132 N. E. 100, the Court of Last Resort in New York held traffic regulations to be applicable in a driveway owned by the New York Central railroad inasmuch as the drive was open to common use by the public, on the theory that such regulation was intended to promote order, safety and convenience. There are decisions in other jurisdictions which clearly hold that where a private owner permits the use of a street or way by the public, he subjects such street to all necessary controls which are applicable to public streets. This rule is set forth in *Crossler v. Safeway Stores*, 51 Idaho 413, 6 Pac. 2d 151, 80 A. L. R. 463. In that case the court said:

While, in the absence of such dedication and acceptance by the municipality, and in the absence of use by the public and work done by the municipality, there may be no liability or duty upon its part to maintain and keep in repair streets used by the public not so dedicated or

accepted, nevertheless, under its police power when streets or alleys, or driveways, . . . which if properly dedicated would be accepted, are laid out, opened up, and used by the public the same as other streets and alleys within the municipality, the same are subject to municipal regulation for the safety of the public.

It was held that reasonable rules and regulations may be extended to privately owned streets where the owners have allowed public passage on same (*Nemours v. City of Clayton*, 237 Mo. App. 497, 175 S. W. 2d 60). Consideration was given to a question similar to the one under discussion in A. G. O. 051-183, 1951 Biennial Report of the Attorney General, p. 481, wherein I ruled that the state highway patrol may properly be called upon to investigate and report motor vehicle accidents occurring on roads which although privately owned are commonly used by the public. This opinion was written with regard to entrances to drive-in theaters and restaurants and I believe the comments set out therein should be extended to the situation presently under discussion. It is to be noted that §324.04, F. S., referred to therein, no longer exists in the same form in which it appeared at the time that opinion was written, however, the substance of that section may now be found in §324.051 (1), F. S.

The conclusion of a later opinion published by this office, A. G. O. 056-78 contains the following language which also supports the position taken herein:

. . . , I am inclined to believe that the reckless driving statute, as well as the driving while intoxicated statute, embraces operation both on and off the public highways of the State.

Based on the above cited authorities, the question as set out herein is answered in the affirmative.

058-145—April 23, 1958

JUDICIAL DEPARTMENT

JUVENILE COURTS—AUTHORITY OF COUNSELOR TO CHARGE ADULTS WITH CONTRIBUTING TO DELINQUENCY OF MINORS, JUDGE AS COMMITTING MAGISTRATE—CH. 57-664, CH. 39; §§30.07, 30.15(3), (4), (9), 32.02(4), 39.06(8), 828.19-828.21, 901.01, 901.06, 901.15, 901.23, 902.01 and 902.18, F. S.

To: *Rufus O. Jefferson, Judge, Leon County Juvenile Court, Tallahassee*

QUESTIONS:

1. In the event that a juvenile court counselor is a properly deputized deputy sheriff of his county, could such a counselor bring criminal charges against an adult of contributing to the delinquency of a minor?

2. If question 1 is answered in the affirmative, can the juvenile court, acting as a committing magistrate, bind over such an adult to the proper court for prosecution?

Chapter 57-664, enacted by the 1957 session of the Florida legislature, established the juvenile court for Leon county. Section 4 of said act provides that Ch. 39 of the Florida Statutes relative

to juvenile courts, shall be applicable to the Leon county juvenile court.

AS TO QUESTION 1:

Sections 828.19-21, F. S., make contributing to the delinquency of a minor a misdemeanor. Deputy sheriffs exercise the same powers and authority as sheriffs, §30.07, F. S. Sheriffs are peace officers, §30.15 (4), (9), F. S. Peace officers may arrest without warrant persons committing misdemeanors in their presence, §901.15, F. S., and shall take persons so arrested to the nearest and most accessible magistrate in the county in which the arrest occurs, §901.23, F. S. A juvenile judge is a committing magistrate, §§32.02 (4), 901.01, F. S., and may issue warrants against persons charged on oath with violating criminal laws, §901.01, F. S. A sheriff may serve process of the juvenile court, §§30.15 (3), 39.06 (8), F. S., and in any event the sheriff shall return the offender to the magistrate who issued the warrant without unnecessary delay, §901.06, F. S.

Based upon the above cited authorities, it would appear that a juvenile court counselor who is a properly deputized deputy sheriff has the authority to arrest, under proper conditions, with or without warrant a person violating §§828.19-21, F. S., by contributing to the delinquency of a minor, and bring said person before a juvenile judge sitting as a committing magistrate. Question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

I find no authority for a juvenile court to try adults. Therefore, it would appear that a juvenile judge sitting as a committing magistrate should bind an adult over to a trial court having proper jurisdiction. Chapter 902, F. S., particularly §§902.01 and 902.18, sets out the procedure to be followed in such instances. Question 2 is therefore answered in the affirmative.

058-146—April 24, 1958

OFFENSES BY PUBLIC OFFICERS

PURCHASE OF AUTOMOBILES BY SHERIFF OF MONROE COUNTY—§§839.08, 839.09, and 839.091, F. S.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs' Association, Tallahassee*

QUESTION:

May the sheriff of Monroe county, who is also the owner of Key West Motors, Inc., the only Ford agency in the county, legally purchase official automobiles from that agency and have such automobiles and those purchased there prior to his ownership of that agency serviced and maintained there?

Section 839.08, F. S., provides that: "No state or county officer shall purchase supplies or materials for public use from himself or from any firm or corporation in which he is interested nor in any manner share in the proceeds of such purchase." Violation of this prohibition is made a misdemeanor.

The intent of the legislature in enacting this legislation was to prevent the conflict of interest which arises when a public officer deals with himself. Dealings involving automobiles would certainly be within the spirit of this statute. It is clearly without

question that the purchasing of parts, service, maintenance, etc., for automobiles is within the scope of the statute.

Absent the specific prohibition of §839.08, F. S., a public officer would be nonetheless prohibited from purchasing from himself. Such statutes are merely the concrete expression of the common law principle, based upon public policy, that an officer in such circumstances may not represent the conflicting interests of both parties (Anno. 140 A. L. R. 345).

Section 839.091, F. S., establishes certain conditions whereby county officers might be removed from the purview of §839.08, F. S. This statute reads in part that:

No person shall be subject to prosecution under §§839.08 and 839.09, when such purchases are: (a) made from the lowest bidder under sealed bids . . . (2) the provisions of this section shall not apply to counties of the state with population of more than one hundred thousand.

This statute changes the public policy of this state so as to permit public officers in certain counties to deal with themselves. The exemptions to be found in §839.091, F. S., were discussed in an opinion of this office, 053-164, (A. G. O. 1953, 1954, pp. 655-656), dated July 20, 1953. It was there said:

Giving attention to the circumstances which prompted the enactment of §839.091, it is apparent that the legislature intended to alleviate an undesirable condition existing in smaller counties because of the effect of §§839.08, 839.09. In those smaller counties the county officials had encountered considerable difficulty in obtaining necessary materials because so many of the local merchants from whom those materials could be purchased most economically were either members of the boards needing the materials or incumbents of county offices having some influence over the boards intending purchasing the materials. Such conditions are not as acute in larger counties and on the state level, and it is reasonable to assume on the basis of this consideration that the legislature intended by §839.091 to relax the provisions of §§839.08, 839.09 only in counties having populations of less than one hundred thousand . . .

We do not here pass upon the wisdom of §839.091, F. S. However, the various categories to be found in this statute appear to be exceptions to the public policy expressed in §§839.08 and 839.09.

According to the 1950 census Monroe county's population is less than 100,000. The sheriff of this county is, therefore, within the scope of the exemption from prosecution found in §839.091, if he meets the requirements of sealed bidding.

In light of the foregoing, your question is, therefore, answered in the affirmative.

058-147—April 25, 1958

CRIMINAL PROCEDURE

SENTENCE, ORAL; SUSPENDED OR MODIFIED—ISSUANCE OF COMMITMENT, RETURN ON BY SHERIFF—§§922.01, 921.02, 921.05, 32.05(3) AND 28.21(1), F. S.

To: J. Louie Carter, Clerk, Criminal Court of Record, West Palm Beach

QUESTIONS:

1. What procedure should the clerk of the criminal court of record follow in issuing a commitment under §922.01, to enforce a county jail sentence, when the judgment and sentence have been orally pronounced in court and not reduced to writing and signed by the judge and the judge has not signed the minutes containing the judgment and sentence?

2. Is the sheriff required to make a return to the clerk's office on a commitment to the county jail, showing his execution of such commitment?

3. When the clerk has issued an original commitment and, at a subsequent date, the judge suspends or modifies the original sentence, should the clerk issue an additional commitment showing sentence suspended, or sentence modified, or what is the proper procedure for the clerk to follow as to issuance of papers thereto?

AS TO QUESTION 1:

Section 922.01, F. S., requires that upon the commitment of a defendant to the custody of the sheriff to serve a sentence imposing a penalty other than a fine only or death, *a certified copy of the sentence* shall be delivered to the sheriff. This statute should be complied with by the clerk of the criminal court of record when a defendant is committed to serve a county jail sentence. The question then arises as to how it can be complied with under the circumstances set out in your question 1.

The law does not require that either the judgment or sentence be in writing and signed by the judge. Section 921.02, F. S., merely requires that the judgment be rendered in open court and §921.05, F. S., does no more than require that the sentence be pronounced in open court. However, all judgments of conviction and *sentences are required to be entered in the minutes* of the court and a clerk is not authorized to issue a commitment except when the minutes show the record of the conviction and sentence (*Wade v. Coniers*, 109 So. 453).

It is my opinion that when the judgment and sentence are orally pronounced, the recording of the same in the minutes is a sufficient predicate for the issuance of a commitment even though the judge has not signed the minutes; and that in such a situation the clerk fulfills his duty under §922.01 when he delivers to the sheriff, along with the commitment, *a certified copy of the minute entries showing the judgment and sentence*.

I observe that §32.05(3) imposes upon judges of criminal courts of record the same duties in the administration of the criminal laws as are imposed upon the judges of the circuit courts, and that §28.21(1) requires that the minutes of the clerk of the circuit court "be signed by the judge before the adjournment of each term."

However, I do not think that this means that the judge of the criminal court of record must sign the minutes evidencing the entry of a judgment and sentence as a prerequisite to such judgment and sentence being valid and enforceable. The weight of authority appears to be that a requirement that the judge sign the minutes is merely directory, so that a failure to do so does not affect the validity of the judgments or orders of the court (see authorities cited in footnotes 5 through 9 on p. 420 of 21 C.J.S., Courts, §226, dealing with the authentication of the minutes by the judges). Since §§32.05(3) and 28.21(1) require of the judge of the criminal court of record nothing more with regard to signing the minutes than that he sign them before the adjournment of each term, and makes no provision for signing them at any other time, and since it would be absurd to say that the legislature intended that a prisoner may not be committed to serve an orally pronounced county jail sentence until the judge signs the minutes at the end of the term, I can only conclude that it is not necessary that the judge sign the minutes before the clerk issues a commitment and furnishes the sheriff a certified copy of a judgment and sentence recorded in said minutes.

AS TO QUESTION 2:

I find no statute which in my opinion requires a sheriff to make a return to the clerk's office on a commitment to the county jail, and therefore I do not think that such a return is necessary.

AS TO QUESTION 3:

Ordinarily, a judge has no authority to suspend the operation of a sentence after it has been imposed and, even if the judge should undertake to do so, I do not think that any duty rests on the clerk to issue an additional commitment. Nor do I think that the clerk is required to issue any other paper to the sheriff concerning such a suspension of sentence unless directed to do so by the court.

If the judge modifies the original sentence, and if the sentence, as modified, unqualifiedly requires the service of a term in the county jail or requires that such a term be served in case of default in paying a fine or fine and costs, I think that it thereupon becomes the duty of the clerk to issue a commitment to enforce said sentence, as modified, and to furnish the sheriff a certified copy of said sentence, as modified.

058-148—April 28, 1958

EDUCATION

EDUCATIONAL TELEVISION—CONSTRUCTION OF §§246.08, 246.09, 246.14 AND 246.15, F. S.

To: *James Etheridge, Jr., Executive Secretary, Educational Television Commission, Tallahassee*

QUESTION:

May the Florida educational television commission, with the approval of the state board of education, spend funds appropriated to its use to assist in the construction of television studio and broadcasting facilities at Florida state university, which facilities will serve as an essential part of the educational television network being established by the Florida educational television commission?

Section 246.08, F. S., provides, among other things, that the Florida educational television commission "is authorized and empowered to establish a television *network* connecting such communities as may be designated" by the state board of education, and if it is economically advisable "construct and maintain such transmission *channels*" and "television microwave network" considered necessary in the establishment of a television network. (Emphasis supplied.)

A television channel is defined in FCC regulation 51-739, dated July 25, 1951, as "a band of frequencies 6 megacycles wide in the *television broadcast band* and designated either by number or by the extreme lower and upper frequencies." A "television broadcast band" is defined in the same regulations as "the frequencies in the band extending from 54 to 890 megacycles which are assignable to *television broadcast stations* . . ." and a television broadcast station is defined as "a station in the television broadcast band transmitting simultaneous visual and oral signals intended to be received by the general public" (see Warner on Radio and Television Law, §73b, p. 674). From the foregoing definitions it is evident that if the commission, with the approval of the state board of education, is authorized to construct a "transmission channel" such would necessarily include a broadcasting station. (Emphasis supplied.)

The word "network" is defined by Harry P. Warner, in §41a of Radio and Television Law at p. 467 thereof, as consisting of "a group of *stations* broadcasting simultaneously the same program." Further in this regard, Webster's new collegiate dictionary defines a radio network as "a chain of radio stations." If the foregoing definitions were applied to the terms "television network" and "television microwave network" in §246.08, *supra*, authority would be reflected in the commission to engage in the project contemplated in the above question, inasmuch as a broadcasting station is a necessary ingredient of a network and a studio the necessary complement of a broadcasting station.

Further assistance in the determination of the above question is §246.09, F. S., which provides that "the commission is authorized to *encourage*:"

- (1) The activation of unused reserved educational television channels;
- (2) The extension of educational television network facilities;
- (3) The coordination of Florida's educational television system with those of other states; and
- (4) The further development of educational television within the state." (Emphasis supplied.)

Reading the above provisions of §246.09, *supra*, in the light of §246.14, F. S., which provides for a liberal construction of Ch. 246 in the interest of public education, the word "encourage" would include financial as well as technical assistance in the furtherance of the considerations enumerated in §246.09, F. S.

In light of the foregoing, it is our opinion that funds of the appropriation provided by §246.15, F. S., "for the purpose of leasing and/or designing, constructing and maintaining the television network designated in §246.08," may properly be applied to the purposes contemplated by your question.

Your question is answered accordingly.

058-149—April 28, 1958

JUDICIAL DEPARTMENT

GRAND JURORS, DADE COUNTY—MILEAGE EXPENSES—
CH. 57-550, §§282.01(1), 40.24, 40.31 and 40.33, F. S.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Is the state comptroller authorized to pay mileage expenses of Dade county grand jurors for more than one round trip from their homes to the court house during a grand jury session?

Chapter 57-550 is a general law of limited application applying to all counties of this state having a population of 450,000 or more, according to the last preceding federal census. Section 4 of said chapter provides that "the grand jurors in each County in this population classification shall be paid the sum of five dollars for each day when in session, or in court, or such sum as the general laws of the State of Florida may provide for the payment of grand jurors, whichever may be the greater. Such payment shall be made as now provided by law. That in addition to all other compensation provided by law, each grand juror shall receive the sum of five cents per mile for every mile necessarily traveled in going from home to the court house, and return, when on official grand jury duty, whether attending Court, grand jury session or grand jury meetings or business."

No comments are herein made as to the constitutionality of Ch. 57-550, under §11, Art. VIII, or any other portion of the Florida constitution. For the purpose of this opinion, the constitutionality of the above designated chapter is assumed. This is in keeping with the long established policy of my office of leaving questions, as to the constitutional validity of acts of the legislature, for judicial determination.

The language of §4 of said chapter, clearly indicates an intention on the part of the legislature that the grand jurors of counties in the designated population classification are to receive 5¢ per mile for each mile necessarily traveled in connection with their grand jury duties.

Prior attorney general opinions of my predecessors in office, holding that what is now §40.24, F. S., contemplates mileage to be paid to petit jurors for one complete round trip during jury service, have been construed by the comptroller as limiting the mileage payment to grand jurors to one round trip during each grand jury session. (Attorney General Fred Davis' Opinion dated May 6, 1930, and Attorney General Tom Watson's Opinion 046-513)

The act under consideration is to be distinguished from the general act considered in those prior attorney general opinions, which are the basis for the administrative ruling of the comptroller, in that §4 of Ch. 57-550, in clear and unequivocal language authorizes a 5¢ per mile expense payment to grand jurors for *each mile necessarily traveled from home to the court house and return in connection with their official grand jury duties, whether for attending court, grand jury session or grand jury meetings or business.* These duties are much broader in scope than petit jury service. Grand jury service in Dade county, is familiarly understood to be a *continuing* service of several months' duration, rather than petit jury service of much shorter duration.

Further examination of Ch. 57-550, fails to reveal a specific

appropriation to defray the mileage expenses authorized therein. This raises the question of whether the authorized mileage expense payments may be made to grand jurors of the counties within the population classification of the act, notwithstanding the constitutional prohibition as to expenditures of public moneys (§4, Art. V, State Const.).

The general appropriation act was passed by the same legislature which passed Ch. 57-550, and it must have contemplated the additional expense authorized in §4 of said chapter when passing the general appropriations act.

That this is the legislature's intent as to Ch. 57-550, appears when an examination of the recommendation of the budget commission to the legislature for the 1957-1959 biennium is made, and the suggested appropriation for the operation of the judicial department, as appears therein, is compared to the actual general appropriation for the operation of the judicial department (§282.01(1), F. S., item 36). Said general appropriation is, in fact, approximately 20% in excess of the amount recommended by the budget commission for the operation of the judicial department during the 1957-1959 biennium. This appropriation is the general fund from which grand jurors are paid.

There is also provision in the applicable general laws for handling any deficiency which may occur in the funds for the payment of jurors (§§40.31 and 40.33, F. S.).

It is my opinion that under the statutes and authorities herein considered, the comptroller is authorized to pay grand jurors of the counties in the designated population classification of Ch. 57-550, the mileage expenses as provided in §4 of said chapter, and he should continue to make such payments until it appears a ratable division of funds to the several counties under said §§40.31 and 40.33, appears necessary.

As Dade county is within the designated population of said act, the question propounded is answered in the affirmative.

058-150—May 1, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

ROAD AND BRIDGE FUND, EXPENDITURE—MONROE

COUNTY—§§951.01 and 951.03, F. S.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs' Ass'n, Tallahassee*

QUESTIONS:

1. In counties where the county commissioners provide a county stockade separate and apart from the county jail, can road and bridge funds be legally used for the repair, maintenance and operation of this stockade?

2. Can road and bridge funds be used to pay for the uniforms, food and other expenses of such prisoners?

3. If the board of county commissioners of Monroe county provide the necessary plumbing and electrical work to pass inspection of the department of corrections of the old jail building and this building is used to house convicted county working prisoners, can the repair, maintenance and operation of this building be paid for by funds from the road and bridge fund?

The constitutional and statutory provisions concerning county road and bridge funds contemplate that all necessary expenditures incurred by the county in connection with the construction and maintenance of county roads and bridges be paid from such fund.

The several counties are specifically authorized to work county convicts on the roads and bridges of the county and to provide substantial food, clothes, shoes, medical attention, etc., for said convicts (§§951.01 and 951.03, F. S.).

The authority to work county convicts on the roads and bridges of the county and to provide food and clothing for said convicts, by necessary implication, carries with it the authority to house in suitable work camps county prisoners working on the roads and bridges of the county.

It is my opinion that the county road and bridge funds may be used to repair, maintain and operate a building necessary for the housing of the county convict labor force. The county road and bridge fund may also be used to clothe, feed and provide medical attention for the county convict repair force.

This opinion is subject to the limitation that county road and bridge funds be expended to provide the repair, maintenance and operation of a county stockade or work camp used solely to house county convict prisoners who are in fact working on the roads and bridges of the county. This same limitation applies to the use of county road and bridge funds to clothe, feed and provide medical attention to county convict prisoners.

The questions presented are answered in the affirmative.

058-151—May 5, 1958

PUBLIC WELFARE

STATE WELFARE DEPARTMENT — LEASE-PURCHASE AGREEMENTS—CONSTRUCTION OF §288.17, and 288.18, F. S.

To: *State Welfare Board, Jacksonville*

QUESTIONS:

1. Can the state welfare department utilize moneys appropriated for rental purposes to retire revenue certificates which may be financed through the state development commission?
2. Is there any way in which the state welfare department can secure the construction of buildings for office purposes through the issuance of revenue certificates and utilize any moneys now allotted to them in their present appropriation?

AS TO QUESTION 1:

Applicable to your 1st question is §288.17, F. S., wherein it is provided:

Any state agency is authorized to pledge any funds which may be appropriated by the legislature *for the use by such agency for expenses* for the payment of service charges necessary to pay the interest and retire the principal serially on revenue certificates issued by the Florida development commission upon approval of the state board

of administration, the proceeds of which are used for the purchase or construction of buildings, individually or jointly with other state agencies, for the use of office space. The authority to pledge funds herein provided for is expressly limited to any funds *as, if and when appropriated*, in that the legislature is under no obligation to make any future appropriation (emphasis supplied).

The above provision, particularly the italicized portion, would appear to include funds appropriated for rental purposes as a proper commitment, at least on a biennium to biennium basis, to retire revenue certificates issued to finance the construction of buildings for office space purposes. (See also *State v. Florida Development Commission*, 84 So. 2d 707.)

You will note that the above statute requires the approval of the state board of administration as a necessary condition to the issuance of such revenue certificates. The role of the board of commissioners of state institutions in such matters should also be considered. In a previous opinion of this office relating to the participation of the board of commissioners in such projects it was stated:

In any event, the final responsibility for carrying out such projects is vested in the board of commissioners of state institutions and any work delegated to the development commission as its agent must meet with the final approval of the board of commissioners. The actual details of planning, financing and construction in any specific project should be agreed upon in advance as to method of operation between the board of commissioners, the development commission and other state agencies which may be involved. 1956 A.G.O. 502.

It is our understanding, from a discussion with the attorney for the development commission, that the above procedure was followed in financing the construction of the office buildings occupied by the welfare department at Pensacola and DeFuniak Springs.

In light of the foregoing considerations, it is our opinion that your 1st question should be answered in the affirmative.

AS TO QUESTION 2:

During the 1955 session of the legislature, house bill 1090 and senate bill 131 were introduced to authorize the welfare board to enter into agreements for the construction of buildings throughout the state for the purpose of providing space for the several local units of the department, and to finance such construction with revenue certificates which could be retired by funds which would otherwise be used for space rental purposes. These bills failed to receive the requisite approval of the legislature. Instead, senate bill 855 passed, which later became §§288.17 and 288.18, F. S., providing for the procedure contemplated in the answer to question 1. It is our opinion that such action of the legislature disclosed its preference for the procedure for financing construction of buildings to house state agencies in the manner outlined in §§288.17 and 288.18, *supra*.

Your 2nd question is answered accordingly.

058-152—May 6, 1958

LABOR

WORKMEN'S COMPENSATION—ELIGIBILITY OF ELECTED OFFICERS—CONSTRUCTION OF §§440.02(1)(c) AND 440.04 (3), F. S.—CLARIFICATION OF OPINION 058-37 (WITHDRAWN)—§§440.02(2)(a) AND 56.20, F. S.

To: *James T. Vocelle, Chairman, Florida Industrial Commission, Tallahassee*

QUESTION:

May officers elected at the polls be included under coverage of the Florida workmen's compensation act?

As you noted in your original letter requesting this opinion, the Florida workmen's compensation act excluded "officers elected at the polls" since its creation in 1935 (§440.02 (1)(c), F. S.). A 1955 amendment to the act, however, appeared to raise a doubt as to the strictness of such exclusion. This amendment added a 3rd paragraph to §440.04, F. S., to read:

(3) When any policy or contract of insurance specifically secures the benefits of this chapter to any person not included in the definition of "employee" or whose services are not included in the definition of "employment" or who is otherwise excluded or exempted from the operation of this chapter, the acceptance of such policy or contract of insurance by the insured and the writing of same by the carrier shall constitute a waiver of such exclusion or exemption and an acceptance of the provisions of this chapter with respect to such person, notwithstanding the provision of §440.05 with respect to notice.

The foregoing quoted provision appears to create an exception to the principle that an insurance contract cannot enlarge the coverage of a workmen's compensation act. However, it is most doubtful that such provision intended to ignore completely the principles inherent in the administration of workmen's compensation coverage.

Generally speaking, and sufficient for the purposes of this opinion, workmen's compensation acts derive their existence from a desire to overcome the rigidity of common law requirements for the remedy of a workman suffering a tort occasioned by the negligence of his employer. (See 58 Am. Jur., Workmen's Compensation, §2.)

Although certain of the common law defenses are not available, or applicable, in the course of a workmen's compensation claim, the master-servant relationship is a necessary consideration. The right to receive and the liability to pay compensation depends upon the existence of this relationship; and it must be created by contract, either express or implied (§440.02(2)(a), F. S.; *Claude H. Wolfe, Inc., v. Wolfe*, 154 Fla. 63, 18 So. 2d 535; *Leon County v. Sauls*, 151 Fla. 171, 9 So. 2d 461; *Kuntzwiler v. City of West Lafayette*, 29 N.E. 2d 1007; *Moon v. Ervin*, 133 P. 2d 933, *Flor v. Ticehurst*, 76 P. 2d 773).

Other than designating the employments which are, for the purposes of the act, to be considered exempt from coverage, the Florida act does not furnish a definition of the term "employee."

The absence of such a definition in a workmen's compensation act is not unusual. In such cases, the term is construed as referring to persons who occupy the status of servant under the law of master and servant (58 Am. Jur., Workmen's Compensation, §132, p. 665).

As stated in a former opinion of this office:

. . . It is within the power of the Legislature, in laws for appropriate purposes, to define employment in such manner as to abrogate master-servant precepts as they existed at common law. In the absence of such legislation in this state the employer-employee relationship is the common law relationship of master and servant (*Gentile Co. v. Florida Industrial Commission*, 10 So. 2d 568). It has been said that at common law there are four elements which are considered upon the question of whether the master-servant relationship exists, viz.: selection and engagement of the services; payment of wages; power of dismissal; and power of control of the servants' conduct in relation to services to be done . . . (1952 A.G.O. 668 (052-180)).

Of equal importance to the necessity of a successful showing that the claimant was an employee of the person against whom the claim was made, is the requirement of a showing that such person had a right to control the method and manner in which the claimant performed his work (*Patton Seafood Co. v. Glisson*, 38 So. 2d 839; *Berrier v. Associated Indemnity Co.*, 142 Fla. 351, 196 So. 188; *Gulf Refining Co. v. Wilkinson*, 94 Fla. 664, 114 So. 503; *Gerrard v. Industrial Acc. Commission*, 105 P. 2d 159; *Alexander v. Bremen*, 187 S. E. 141, and *Banks v. Ellijay Lumber Co.*, 200 S. E. 480. See also 1941 A.G.O. 580).

Unless specifically designated as an employee for the purposes of workmen's compensation, it is seriously doubtful that an elected officer may be impliedly considered amenable to the classification of an employee or servant. Judge Cooley is quoted by Schneider, in his treatise entitled: *Workmen's Compensation Law*, as saying: "The officer is distinguished from the employee in the greater importance, dignity and independence of his position, in being required to take an official oath; and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office; and usually, though not necessarily, in the tenure of his position."

A similar distinction is made by Larson, an eminent authority in the field of workmen's compensation law, wherein, in §56.20 of his treatise thereon, he holds that the official performs "functions of government for the direct benefit of the public, exercising considerable discretion and answering not to some 'employer' . . ."

In a former opinion of this office on a question substantially similar to the question presented herein, which opinion was rendered prior to the above-mentioned 1955 amendment, it was held: "The theory that constitutional officers of the State of Florida under any circumstances are employees within the meaning of the act is not tenable."

"The term 'public office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority (E.g., *State v. Sheats*, 78 Fla. 583, 83 So. 508; *State v. Jones*, 79 Fla. 56, 84 So. 84. *State ex rel Arthur Kudner, Inc., v. Lee*, 150 Fla. 35, 7 So. 2d 110). In light of

the above statement and the authorities supporting it, it is to be observed that the powers and duties of a public officer are not those to be exercised by an employee; that while a person occupying such an office may be subject to appropriate disciplinary action for malfeasance, misfeasance or nonfeasance, the characteristics of the office are constant regardless of the occupancy; and the person occupying such an office (state or county), to the extent that he is charged with the exercise of certain public duties, is the state." (1953 A.G.O. 477.)

In light of the foregoing, it is my opinion that the above-mentioned 1955 amendment does not relax or revise in any way the exclusion of "officers elected at the polls" as contained in §440.02(1) (c), F. S., nor does it, in such regard, provide an exception to the principle that an insurance contract cannot enlarge the coverage of a workmen's compensation act. This does not intend to imply, however, that an "elected officer" may not be included in a policy or contract of insurance which secures the benefits of the workmen's compensation act to such person. The 1955 amendment is patently authority for such coverage. If an "elected officer" is specifically included in a contract or policy of insurance securing the benefits of the workmen's compensation act, he would qualify for payment under the contract of insurance, and not under the workmen's compensation act, and then only if his injury would have been compensable had he been an employee under the workmen's compensation act. Enforcement of such payment would be brought under a contract theory, and not as an action in workmen's compensation.

In summary, it is my opinion that while the 1955 amendment does not include elected officers within the workmen's compensation act, it does not exclude the inclusion of "elected officers" in a contract or policy of insurance. Since the industrial commission is only concerned with the adjudication of claims of persons properly within the provisions of the workmen's compensation act, it would not be concerned with the claim of an "elected officer" included under a contract of insurance by virtue of the 1955 amendment. Your question is answered accordingly.

In closing, it should be noted that the foregoing opinion is restricted solely to the effect of the 1955 amendment on the application of workmen's compensation benefits to "elected officers," and does not intend to imply that such was its sole function. It appears that such amendment also complemented §440.04(2) to the extent that the writing and acceptance of a policy of insurance which specifically includes an employee exempt under the act obviates the necessity of the notice of waiver contemplated by subsection (2).

058-153—May 6, 1958

**REGULATION OF TRAFFIC ON HIGHWAYS—MINORS
MOTOR VEHICLE ACCIDENT REPORTS—CONSTRUCTION OF
§39.03(6), F. S.—§§186.0182(3), F. S.**

To: *Joseph T. Hudson, Jr., Head Counselor, Alachua County Juvenile Court, Gainesville*

QUESTION:

Do the restrictions contained in §39.03(6), F. S., apply to accident reports filed with the department of public safety by a municipal police department?

The above question is concerned with the application of the provision of §39.03(6), F. S., which reads:

... Any record of the child made by any law enforcement officer or other person except the officers and employees of the juvenile court shall be made in a separate record kept for that purpose, identifying the child only by the initials and juvenile court case number of the child; shall not be a public record, and shall not be open to inspection by anyone other than the officers and employees of the juvenile court and by the child, the parents or legal custodians of the child, and their attorneys.

In line with the character and purpose of juvenile courts, the above provision was designed to guard the juvenile against a criminal stigma. (See 31 Am. Jur., Juvenile Courts, etc., §5.)

Section 186.0182(3), F. S., provides that: "It shall be the duty of all police officers and other peace officers to report to the department of public safety of Florida, or such other agency as may by statute be designated therefor, on the form provided, all accidents within 24 hours of the time they receive such information.

Section 317.15(1), F. S., in addition to providing that the department of public safety shall prepare the accident report forms, states: "The written reports to be made by persons involved in accidents and by investigating officers shall call for sufficiently detailed information to disclose, with reference to a traffic accident, the cause, conditions then existing, and the persons and vehicles involved."

The purpose of the foregoing provisions establishing the accident report requirement and similar laws is to reduce the number of accidents involving motor vehicles, and render the highways as safe as possible. (See *Rawson v. Department of Licenses*, 130 P. 2d 876. The function of such laws is civil and administrative and is not penal in purpose or nature. (See *Commonwealth v. Funk*, 186 A. 65.)

For these reasons, we are inclined to the opinion that the restrictions contemplated by §39.03(6), F. S., are not applicable to motor vehicle accident reports.

058-155—May 9, 1958

CRIMINAL PROCEDURE

FORM OF COMMITMENT OF DEFENDANT SENTENCED TO DEATH—§§922.11, 944.17 AND 950.02, F. S.

To: *E. B. Leatherman, Clerk of Circuit Court, Miami*

QUESTION:

Is the uniform commitment to the custody of the division of corrections which has been promulgated by the director of said division to be used by the clerks of the circuit courts in committing defendants in capital cases?

The uniform commitment referred to in your letter is the form which was approved in my opinion 057-395, dated Dec. 31, 1957, and which has been promulgated by the director of the division of corrections under authority of §944.17, F. S.

I do not think that said uniform commitment is proper to be used in a capital case where the death penalty has been imposed upon the defendant. It requires that the "term of sentence" be stated and requires the division of corrections to keep and safely imprison the defendant "for the term of said sentence." Since a death sentence does not require the imprisonment of the defendant for any term but, to the contrary, requires that he be executed, the said uniform commitment should not be used where such a sentence is imposed.

However, said uniform commitment should be used in every instance where the defendant is sentenced to the state prison for life or for any lesser term, whatever may be the crime for which he is sentenced and regardless of whether he was convicted under an indictment alleging a capital offense or whether he was convicted under an indictment or information charging a noncapital offense.

The form of commitment ordinarily used by you, a copy of which came with your letter, is likewise inappropriate in a case where the death penalty has been imposed because, according to its terms, it is issued to enforce a sentence that the defendant "be punished by confinement at hard labor in the state prison for a term of _____" and because it requires the imprisonment of the defendant in the state prison "for the term of _____." Nor should said form be used when the death sentence has not been imposed because in such cases §944.17, F. S., requires that the said uniform commitment form be used.

Since neither of the above mentioned forms of commitment are to be used when the death sentence has been imposed, it appears appropriate for me to set forth a form which may properly be used in such cases.

In my opinion, the execution of a condemned person is under the authority of a death sentence imposed by the court and a death warrant issued by the governor (§§922.09 et seq., F. S.) rather than under the authority of a commitment issued by the clerk of the trial court.

Section 922.11, F. S., contains the following provision:

In all cases where sentence of death has been pronounced against any person to be executed by electrocution as provided, the convicted person shall be delivered by the sheriff of the county to the superintendent of the state prison at the place of execution, as soon as may be after receipt of the death warrant for such convict from the governor. (Emphasis supplied.)

The above cited statutes considered, it seems to me that the function of a commitment in a death case is to evidence the authority of the sheriff to hold the condemned person in the county jail until the governor issues a death warrant, and to thereupon deliver him to the superintendent of the state prison at Raiford. Hence I think that a commitment in the following form would be appropriate in a death case:

STATE OF FLORIDA
COMMITMENT OF DEFENDANT SENTENCED TO DEATH

(Court)

County. _____ Term, 19____

Conviction for _____
(Offense)

Date of Conviction: _____

Date Sentence Imposed: _____

Sentence: _____

STATE OF FLORIDA, _____

Plaintiff

v.

_____,
Defendant.

IN THE NAME AND BY THE AUTHORITY OF THE STATE
OF FLORIDA, TO THE SHERIFF OF SAID COUNTY:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced to death for said offense by said Court, as appears from the attached certified copies of indictment, judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you to take and safely keep the said defendant until the Governor of the State of Florida shall issue a death warrant for the execution of said defendant, and that, as soon as may be after the issuance of such death warrant by the Governor, you deliver the said defendant to the Superintendent of the State Prison of Florida, at Raiford. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable _____,
Judge of said Court, as also _____,
Clerk, and the Seal thereof, this the _____
day of _____, 19____

(SEAL)

Clerk of Said Court

The policy of our law is to avoid taking a man to the state prison and placing him in the death house until his conviction is affirmed, if he takes an appeal, and until the governor evidences his willingness that the execution proceed by issuing a death warrant. This policy is made manifest by the above quoted provision of §922.11 that a condemned person be taken to the state prison as soon as may be *after* the death warrant is issued.

Therefore, I know of no legal justification for transferring a condemned person to any place outside of the county prior to the issuance of a death warrant, except when necessary for safekeeping or to prevent injury to the prisoner. Even when a removal is necessary for either of these purposes, §950.02 requires that it be to another county jail, not to the state prison.

So, I think that the form of commitment set forth above would comply with the policy of the law by commanding the sheriff to hold the condemned person until the issuance of a death warrant and *then* take him to the state prison.

Of course, the clerk would not be in position to issue a commitment in the form set out above if its terms should conflict with an order of the circuit court. For example, if, despite the absence of a death warrant, the circuit court should order the condemned person taken to the state prison before the clerk issues a commitment, such order would conflict with the terms of the above set forth commitment (which requires the sheriff to hold the prisoner until the issuance of a death warrant and then deliver him to the

state prison), and in such case some other form of commitment should be issued. Should a condemned person be taken to the state prison under court order before the issuance of a death warrant, it is my opinion that the prison authorities would have the legal right to refuse to accept him; if they should do so, the responsibility would be that of the circuit court which made the transfer order, not that of the clerk.

058-156—May 9, 1958

PUBLIC RECORDS

SALES TAX RECORDS OF PRIVATE BUSINESS MAINTAINED UNDER CH. 212, F. S.—AVAILABILITY TO PUBLIC FOR INSPECTION—§§119.01, 119.03, 212.12-212.15, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is information obtained by reason of audits of private businesses made by the state comptroller in connection with the administration and enforcement of Ch. 212, F. S., available to the public and interested parties?

Under §119.01, F. S., "all state, county, and municipal records shall at all times be open for a personal inspection by citizens of Florida, and those in charge of such records shall not refuse this privilege to any citizen." "In all cases where the public or any person interested has a right to inspect or take extracts or make copies from public records, instruments or documents, any such person shall hereafter have the right of access to said records, documents or instruments for the purpose of making photographs of same while in the possession, custody and control of the lawful custodian thereof, or his authorized deputy . . ." (§119.03, F. S.). This "right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example . . . letters and dispatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals" (Lee, City Manager v. Beach Pub. Co., 127 Fla. 600, 173 So. 440, text 442).

Communications to public officers may be divided into two classes: (a) Communications relating to affairs of state, sometimes referred to as state secrets; and (b) communications relating to individuals (Anno. in 9 A.L.R. 1100; 97 C. J. S. 747, et seq., §264; 45 Am. Jur. 433, §26; 5 Jones Commentaries on Evidence, 2nd Ed. Rev., 4199, §2202; 1 Greenleaf on Evidence, 16th Ed., 387-388, §§250 and 251; 4 Wigmore on Evidence 3335, §2375). Reasons of public policy may suggest the necessity, in the interest of the government, of not allowing access to the papers and records in offices of those charged with the collection of taxes and revenue, or in permitting only a limited access to such papers and records. "The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded" (Boske v. Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846, text 850). It has been held that for reasons of public policy public officers should not be asked the names of those from whom they receive information as to frauds on the revenue (Home v. Bentinck, 2 B. & B. 130,

4 J. B. Moore 563, 22 Rev. Rep. 748, 129 Eng. Reprint 907). This rule seems to relate to informers and *not to a taxpayer's own statement concerning his own taxable property to the proper taxing official*, which was not a privileged communication at common law (4 Wigmore on Evidence, 3334, §2374, subsection 4; Chichester v. Peden, 121 Va. 147, 92 S. E. 984, 2 A.L.R. 1414). Informers in revenue cases have often been protected against the disclosure of information furnished by them to tax and revenue collectors (Anno. in 2 A.L.R. 1422). Communications to public officers relating to state affairs and business have often been held to be privileged and should not be disclosed by the public officers unless the privilege be released by some competent authority (Anno. in 9 A.L.R. 1100 et seq., and 165 A.L.R. 1302).

Our statute imposing a tax on sales, use and certain transactions (Ch. 212, F. S.) has been upheld by the supreme court of this state (Gaulden v. Kirk, Fla., 47 So. 2d 567, and other cases). Under §212.12 the "comptroller is given power to prescribe the records to be kept by all persons subject to the tax imposed by this chapter and it shall be the duty of every person . . . to keep and preserve suitable records of the sales, leases, rentals, admissions, or purchases . . . and such other books of account as may be necessary to determine the amount of the taxes due hereunder," which books are subject to *inspection and audit* by the comptroller or his agents. Under §212.13 the comptroller *may*, in connection with the enforcement of Ch. 212, F. S., examine the books, records and documents therein mentioned and from them determine the amount of taxes due under Ch. 212, F. S. Under §212.14 the comptroller may hold hearings and take testimony in connection with the enforcement of Ch. 212, and "to estimate any unpaid deficiencies" in sales and use tax accounts and issue warrants for the collection thereof.

Under §212.15 "if any taxpayer or person required by this chapter to remit taxes to the comptroller shall feel aggrieved by any action of the comptroller, he shall have the right, within thirty days to appeal to the comptroller for a rehearing and re-examination and in support thereof may submit such data as may be relevant." In case of an adverse ruling by the comptroller such person may seek a review by appropriate proceedings in the circuit court in which review there is no presumption in favor of the comptroller's findings. This provision doubtless contemplates the filing of a written application for a rehearing before the comptroller or his agent, which may be filed documents if deemed necessary by the applicant. This provision doubtless contemplates certain public records, including the comptroller's ruling on the application. Although certain books and records are required to be kept and maintained by the taxpayers, there appears from the statutes no intention of the legislature to make these books and records public records.

It appears that *all tax assessments imposed, warrants, and executions issued, satisfactions and similar instruments*, constitute public records under §119.01, F. S. *Information obtained from informers and private business information obtained by reason of audits and examinations of the private business affairs of the taxpayers would not seem to be public records* within the purview of §119.01, F. S. The comptroller and his agents should take care not to reveal the private business facts and affairs of taxpayers which might seriously affect them.

We construe this opinion to be in line with our opinion 057-82

of March 22, 1957, relating to comptroller's records with reference to the small loan business, and not in conflict therewith. Your question is answered in the negative.

058-157—May 12, 1958

EDUCATION

PENSACOLA JUNIOR COLLEGE—AUTHORITY OF ESCAMBIA BOARD OF PUBLIC INSTRUCTION TO CHANGE LOCATION—EXPENSE OF RENOVATION OR CONSTRUCTION OF NEW FACILITIES—UTILIZATION OF PRESENT FACILITIES—§§230.23, 230.46, 230.47, 230.55, 230.57, 235.15, 235.16, 235.19, 235.21, 235.24, 235.25, 235.27-235.29, F. S. AND §18 (5) (d), ART. XII, STATE CONST.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Does the board of public instruction of Escambia county have the authority to change the location of the Pensacola junior college from its present site to a new location?

2. If the Pensacola junior college is moved to a new location, could the capital outlay funds provided by the 1957 session of the legislature, as shown in §230.55 F. S., be expended on the renovation or construction of new facilities at the new location?

3. What specific legal requirements must the board of public instruction comply with in the event it should be determined that it is legally permissible for the school board to move the college from its present location?

4. What, if any, legal restrictions would be imposed upon the school board relative to the utilization of the present junior college facilities for other school purposes?

Section 230.23, F. S., relating to the powers and duties of county boards of public instruction provides that the county board shall have possession of all school property in the county; *manage and dispose of such property to the best interest of education*. It further provides that the school board shall, after considering recommendations of the county superintendent, authorize schools to be located and maintained in those communities in the county where they are needed to accommodate as far as practicable and without unnecessary expense all the youth who should be entitled to the facilities of such school. It further provides that the county school board may eliminate school centers within the county and consolidate schools whenever the needs of pupils can better and more economically be served at one school center than those which they have been attending, provided that the elimination of school centers coming under the supervision of trustees shall be subject to the consent of those trustees.

Section 230.46 provides that any county board may upon first obtaining the approval of the state board, establish or acquire a junior college as a part of the county school system and organize and operate junior colleges or acquire and operate a junior college which has previously been established.

Section 230.47 provides that junior colleges established or acquired under the provisions of §230.46 cited above, shall comprise a part of the county school system and *shall be subject to the general school laws of the state in so far as such laws are applicable, but shall be under the control of the county board of the county in which it is located.* This section further provides that a junior college may be separately organized and operated or may be organized and operated in connection with a secondary school.

Section 230.57 provides that junior colleges shall be owned and operated by the county board of public instruction of the county in which the college is located, subject "however, to divestment by law of the legislature transferring title to the state board of education."

With reference to the quoted language above, however, I do not find that the legislature has enacted any law transferring title to the state board of education of property owned by a county school board for the purpose of operating a junior college. Until such time as the legislature might see fit by appropriate law to divest title to such junior college property from the school board and vest it in the state board of education, it is clear that such property would remain under the control and disposition of the county school board.

Section 230.55, F. S. (Ch. 57-760) provides an appropriation to the county school fund of those counties which operate junior colleges. It is clear, however, that these appropriations are to the junior colleges as institutions under the county school board and are not tied down to any specific property site on which a junior college may presently be located. In other words, I find no language in this appropriation act or in any other section of the law which would require the appropriation in question to be used solely for the construction or renovation of junior college buildings at their existing site if it should develop that it is desirable from an educational standpoint for the county board to change the location of the junior college.

There are a number of sections of the law which relate to the duty and authority of the state superintendent of education and the state board of education *to make surveys and studies for school sites and to approve school construction before the county board is authorized to proceed with the construction of a new school.* Among these sections are §§235.15, 235.16, 235.19, 235.21, 235.24, 235.25, 235.27, 235.28, 235.29, F. S., and §18 (5) (d), Art. XII, Fla. Const.

In view of the above, we think it is clear that the general statutes neither directly nor by implication preclude the transfer of a junior college from the site in a county where it now exists to another site in the county provided the various requirements of law and state school board regulations relating to surveys and minimum standards are satisfied.

In this regard, we think that a junior college should be considered in the same category as any other school operated by a county school board as a part of the public school system and that an existing junior college might be transferred to a new and presumably more adequate site in the county and that the old junior college buildings if found suitable, might be used for another school purpose. Without such flexibility, it is apparent that a serious disadvantage might be encountered by a county school board and the state board of education in complying with the intent of the constitutional and statutory provisions which contemplate the use of school facilities to provide maximum educational benefits to the state

and its people.

Taking into consideration the above cited provisions of the law and discussion, it is apparent that a junior college is a part of the county school system subject to the control of the county board of public instruction, which is in turn subject in some respects to the control of the state superintendent of public instruction and the state board of education. With respect to the disposal of public school buildings and lands, and the acquisition of new sites and buildings, or the transfer of an existing building or buildings from one school purpose to another, the county board has authority for such action, subject to the various restrictions imposed by law and state board regulations relating to minimum standards and surveys conducted by the state superintendent for the purpose of maintaining such standards.

Your specific questions are therefore answered as follows:

Question 1 is answered in the affirmative subject to the survey requirements and approval of the state superintendent and state board of education cited above.

Question 2 is answered in the affirmative subject to survey requirements and approval of the state superintendent and state board of education cited above.

Question 3 is answered by the above cited provisions of law and discussion relating to minimum standards and surveys and state board of education regulations and approval implementing said laws.

Question 4 is answered by the same provisions referred to in our answer to question 3.

058-158—May 13, 1958

ELECTORS AND ELECTIONS

SPECIAL REREGISTRATIONS—HILLSBOROUGH COUNTY—
§§98.011, 98.031, 98.051, 98.281, 98.201, 97.031, F. S.

To: *Harry J. McDonald, Assistant Hillsborough County Attorney,
Tampa*

STATEMENT OF FACT:

It is estimated that there are 100,000 eligible voters residing in Hillsborough county who are not presently registered on the election books and therefore will be unable to vote in the coming elections. Several civic organizations and a majority of the public officials of Hillsborough county are interested in getting the unregistered citizens of both political parties to register so that they can exercise their democratic right to suffrage in the coming elections.

QUESTION:

May the supervisor of registration place the registration books in various locations within the larger cities and the county during the summer months so as to make registration easier, stimulate interest, and thereby increase the number of registered voters?

As I understand it, the supervisor wishes to place the registration books in populated areas where the records indicate that registration is light, but said supervisor does not propose to put the books in the individual precincts. In this regard the registration books might be placed in a location convenient to the re-

sidents of a dozen small precincts in one area and perhaps only two or three large precincts in another area. Placement of the registration books would be left to the discretion of the supervisor of registration.

Hillsborough county is unique in that it has a special act creating an election board for that county but, as you say, that act is silent insofar as this phase of registration is concerned and, therefore, the contents of that act are not considered applicable to this opinion.

Two sections of the election code §§98.031 and 98.051, F. S., deal with precinct registration and limit said registration to the months of January and February in particular years. As I understand the facts in the instant situation, a precinct registration is not contemplated and therefore those sections are not applicable to the issue.

Section 98.281, F. S., provides in part:

Special registration procedure, deputy supervisor to handle registration.—Each supervisor may appoint deputy supervisors to accept registration of those who are qualified in settled sections of the county as may be reasonably necessary.

Section 98.281 is not as clear as it might be but it does seem to anticipate the very situation under consideration. While this section has been a part of the election code since its inception in 1951, it has evaded interpretation by the supreme court and has been considered by this office on only a single occasion not related to the issue under consideration. There has been some question as to the meaning of the word "settled" as it appears in §98.281. While not much help, Black's law dictionary defines "settled" as follows:

A word of equivocal meaning; meaning different things in different connections, and the particular sense in which it is used may be explained by the context of the surrounding circumstances. . . .

As related to the phrase in which it is found "settled" appears to mean the opposite of unsettled and refers to populated areas as it would seem somewhat absurd to transport the registration books to an unsettled and wholly unpopulated area.

In any event, under the terms of §98.281, F. S., the decision to place the books in any area for special registration shall be as is "reasonably necessary" and therefore is a discretionary matter. This discretion appears to lie with the supervisor of registration and properly so inasmuch as the "Supervisor is the official custodian of the books of registration with the exclusive control of matters pertaining to the registration of electors" (§98.201, F. S.). There is, of course, a control on the abuse of this discretion by the election board in this case or the county commissioners generally as they hold the supervisor's purse strings.

It is recognized from the well established precedent, which appears to be in effect today, "that a registration of voters made at a time, or in another manner, than that prescribed by statute, is not a legal registration" (State v. Sumter County Comm., 20 Fla. 859). In line with this precedent, this office has always advised supervisors of registration out of an abundance of caution to refrain from registering electors if there was any doubt as to the validity of the procedure. While I find no indication that the procedure under discussion has been used before, this is by no means an indication that

it is not a lawful procedure. In fact, it is my opinion that the legislature intended this type of registration and the fact that they provided for it only once in a single sentence in one short section of the election code, should have no adverse effect on its validity.

It has been a principle of democracy since its inception that it is a government *by* the people. In order to have a true government *by* the people we must have as many of the eligible voters as possible at the polls on election day but if these people are not registered they, of course, cannot vote (§2, Art. VI, State Const., §97.031, F. S.). It is well known that the registration books are open for registration during the majority of the working days in the year in the office of the supervisor of registration, §98.011, F. S., but generally that office is located somewhere in the county courthouse in the congested center of a busy metropolis. Inasmuch as the polling places are placed in areas of easy access on election day, I see no reason to frustrate the good intentions of many would-be good citizens and electors and complicate the registration procedure by making the registration books more inaccessible than the polls. Furthermore, since the registration books are generally open in the supervisor's office, I can see absolutely no harm in having these books available in several other locations at the same time.

Based upon the authorities cited above, it is my opinion that the question as presented herein should be answered in the affirmative.

058-159—May 15, 1958

CRIMINAL PROCEDURE

FINE AND COST BONDS—LIABILITY OF SHERIFF—NECESSITY FOR SURETIES TO QUALIFY AS BONDSMEN—§§921.15, 903.05, 903.09 AND 903.37(3), F. S.

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs' Association, Tallahassee*

QUESTIONS:

1. If a defendant, having posted a fine and cost bond, fails to pay such fine and costs, and such delinquencies are likewise uncollectable from the sureties, is the sheriff or his office liable?
2. Where real property is the basis for a fine and cost bond, is it necessary that the surety on such bond own said property in the county where the bond is to be executed?
3. If a person is on a supersedeas bond as surety in the district court of appeal and later desires to sign a fine and costs bond as surety, is it necessary that he register and qualify as bondsman?

AS TO QUESTION 1:

I assume the fine and cost bond was given as provided by §921.15, F. S. Under this statute the sheriff is authorized to approve such bonds where the court is not in session. The question of the sheriff's liability on the bond where both the defendant and the surety have failed to pay within 90 days as required by the statute was discussed by this office in opinion 045-241 (A. G. O. 1945-1946, p. 124), dated August 17, 1945. It was there said:

If it develops that the bond so taken by the sheriff

is worthless and at the time it was approved by the sheriff he knew that the same was worthless, then, in my opinion, the bond of the sheriff would be liable, because his bond is conditioned upon the faithful discharge of the duties of his office (see §§30.01 and 30.02, F. S. . . .), and the taking of such a bond would be a breach of this condition.

The sheriff is liable on fine and cost bonds only in such instances where he knowingly accepts a worthless bond. Your 1st question is answered accordingly.

AS TO QUESTION 2:

Although §921.15, F. S., is silent on the requirements for a fine and cost bond where real property is its basis, in answering your 2nd question the statute, being a bail statute, should be considered in conjunction with the provisions of Ch. 903, F. S., which regulates bail generally. Section 903.05 provides that:

Each surety for the release of a person on bail, other than a surety company duly authorized by law to act as such surety, shall be a resident of or owner of real estate *within the state*. (Emphasis supplied.)

After return of the unpaid bond by the sheriff, under §921.15, the clerk of the court is required to issue execution for the amount of the fine and costs against the security or bail, as if there had been a judgment at law on the bond.

It is my opinion that there is no necessity where real property is the basis of a fine and cost bond for a surety to own property in the county where such bond is executed. So long as property is owned within the state, execution can be had on a forfeited bond anywhere in the state. Your 2nd question is answered in the negative.

AS TO QUESTION 3:

It is assumed in answering your 3rd question that the person wishing to go surety on a fine and cost bond, while acting in that capacity on a supersedeas bond, is doing so without receiving compensation. Section 903.37, F. S., contains this definition:

(5) "Professional bondsman" shall mean any person who pledges United States currency, United States postal money orders, or cashier's checks or other property as security for a bail bond in connection with a judicial proceeding and receives or is promised therefor money or other things of value. (Emphasis supplied.)

The statutes distinguish between a "surety" and a "bondsman," i.e., one who receives "money or other things of value" in connection with his services, in the method of justification of sureties. Section 903.09 provides that:

(1) Each surety shall justify by affidavit that he possesses the qualifications and sufficiency to become a surety, and in such affidavit shall describe his property, to which he proposes to justify as to his sufficiency, stating the encumbrances thereon, and the number and amount of undertakings, if any, in any court, entered into by him and remaining undischarged. The false making of any such affidavit shall be considered perjury.

(2) Each bondsman as defined in §903.37(3) shall justify his suretyship by attaching a copy of the power of attorney issued by the company to each bond, or by attaching to the bond United States currency, United States postal

money order or cashier's check in the amount of the bond; provided further that the United States currency, United States postal money order or cashier's check cannot be used to secure more than one bond.

It is my opinion that the bail bondsman registration provisions of the Florida Statutes apply to those who engage in such activity for compensation. Under such interpretation, the determining factor is not the number of bonds upon which a person is surety, but whether he receives compensation for so doing.

058-160—May 15, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SECURITIES COMMISSION—SALE OF MINERAL INTERESTS,
§517.02, F. S.**

To: *C. Wilson Cogswell, Director, Florida Securities Commission,
Tallahassee*

QUESTION:

Does the sale of 100% mineral interest in and under a specific area of land, conveyed by deed to same, come within the purview of Ch. 517, F. S.?

Section 517.02, F. S., is in part as follows:

When used in this chapter the following terms shall, unless the text otherwise indicates, have the following respective meanings:

(1) "Security" shall include . . . certificates of interest in a profit-sharing agreement, or the right to participate therein; certificate of interest in an oil, gas, petroleum, mineral or mining title or lease, or the right to participate therein

In the case of *Boyer v. Black*, 18 So. 2d 886, the subject matter of the controversy was an assignment of gas and oil leases to forty acres of land in Texas. In holding that the instrument was not a security within the meaning of the statute, the court said:

. . . A lease of gas and oil rights in Texas lands being an instrument conveying an interest in land with none of the attributes or characteristics of a "security," as the word is generally and commonly understood, the inclusion of such instrument in the legislative definition of "securities" by Ch. 21709, 1943, without specific reference being made or notice given in the title that a special definition of such subject matter is contemplated, constitutes the introduction in the body of the act of matter not expressed in the title or properly connected therewith. . . . subject to certain limitations, the legal instruments by which gas and oil rights are transferred from one person to another may be lawfully brought into the sphere of operation of the Uniform Sales of Securities Law and regulated as securities. Perhaps they ought to be. Although indispensable instruments of honest and legitimate oil exploration and production they are sometimes employed by the dishonest and unscrupulous as vehicles of speculation and fraud. But before such regulation can be validly effectuated, the title to the act bringing such instruments within the scope of such leg-

isolation must be sufficient to put the public on notice or lead to reasonable inquiry that such is the intent and purpose of the amendatory provision.

An act, the title of which is insufficient, becomes valid by incorporation in a general revision of the laws whether the insufficiency has been adjudicated or not (*State ex rel Badgett v. Lee*, 22 So. 2d 804). Inclusion of a general act of the legislature in the statutory revision will cure a defect in the title of the act (*Brewer v. Gray*, 86 So. 2d 799, and *Rodrigues v. Jones*, 64 So. 2d 278).

From the above it appears that the defect in the title has been cured by the inclusion of the general act of the legislature in the statutory revision, through and including the 1957 acts of the legislature.

For the above reasons your question is answered in the affirmative.

058-161—May 15, 1958

TAXATION

OCCUPATIONAL LICENSE, OUTDOOR ADVERTISING— §§205.13 AND 479.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a person holds a license or permit from the outdoor advertising division of the state road department under Ch. 479, F. S., and is engaged in the same business within a municipality, is he subject to the occupational license taxes under Ch. 205, F. S.?

In Attorney General's Opinion 048-99 the rule was adopted that the license required by §479.04 was intended as a revenue measure and not merely as a regulatory measure, and, therefore, the license as required in §479.04, F. S., was not within the purview of §205.13, F. S.

The above rule would not apply to a firm engaged in the same business within a municipality for the reason that §479.04, F. S., clearly excludes the business of outdoor advertising within the corporate limits of any city or town. Said statute reads in part as follows:

No person shall engage or continue in the business of outdoor advertising in this state outside the corporate limits of any city or town without first obtaining a license therefor from the state chairman . . .

For this reason your question is answered in the affirmative.

058-162—May 21, 1958

CRIMES

PERMITTING THE PLAYING OF POOL BY MINORS ON MIN- IATURE COIN-ACTIVATED TABLE—§849.06, F. S.

To: *W. F. Anderson, County Judge, Levy County, Bronson*

QUESTION:

Is it unlawful to permit minors to engage in the game of pool, when such game is played on a miniature, coin-activated table?

Section 849.06, F. S., provides:

849.06. *Allowing minors to play pool or billiards; permitting minors to visit places where pool or billiards are played.*—Any person, or any employee of such person, operating any pool or billiard saloon in this state, or operating any place where pool or billiards are publicly played, who shall permit or allow any person under the age of twenty-one years to play pool or billiards or visit or loiter in any pool or billiard saloon, or place where pool or billiards are publicly played, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars, or twelve months in the county jail.

It is understood from your letter that subsequent to the insertion of a coin into the table and the release of the pool balls, the game played on this miniature pool table proceeds under the same rules and procedures as would apply in a contest on a full size pool table.

It would seem that the purpose of the above enactment is to prevent minors from frequenting places where pool is publicly played, and thus protect them from exposure to unhealthy influences and from demoralizing habits which the legislature considered could so easily be contracted by minors in such places.

This above section makes no reference to the size of the pool table or the method of paying for the privilege of playing said game as determining whether or not the game played is pool. It would seem that notwithstanding the size of the pool table and the necessity of inserting a coin into the table in order to activate the game, the participants are engaging in the game of pool.

Although at first blush it might appear that the above enactment was not intended to control the use of a single miniature pool table located in a corner drugstore or like establishment, a careful consideration of said statute leads to the conclusion that it does control such use.

There is no question but that the proprietor of a corner drugstore who maintains a full-size pool table on his premises would be subject to the provisions of §849.06, F. S.

Inasmuch as the game played on the miniature pool table you described remains a game of pool, any person who operates a public establishment devoted to such games but utilizes miniature pool tables rather than standard size pool tables, must be considered as operating a pool room as contemplated by §849.06, F. S. It would then be logical to view the maintenance of one miniature pool table in any public establishment sufficient to bring into operation the provisions of §849.06, F. S.

As pointed out above, the game of pool does not become a different game simply because the size of the playing area is reduced. This is true whether the table area is reduced or diminished only a few inches or by one-half. It is pointed out that a pool table twice the size of a regulation table would still be a pool table.

It is recognized that there are many innovations to the game generally known as pool. Some contests require the use of only a portion of the pool balls, while other forms of the game re-

quire the utilization of all the balls provided. It is also recognized that the cue sticks are not uniform in size or weight. Moreover, I point out that certain forms of the game are played on only one-half of the table provided. Notwithstanding these differences, the game played continues to be a game of pool.

It is pointed out that a card game remains a card game, notwithstanding the size of the cards utilized; likewise the elements of a dice game remain constant no matter what the size of the dice used or the dimensions of the playing area.

The evil the legislature desired to eradicate by the enactment of §849.06, F. S., is present regardless of the size of the pool table involved.

It is my opinion that the maintenance of a miniature pool table in a public place frequented by minors would constitute a violation of §849.06, F. S., even though the minors did not engage in the game but merely visited or loitered in such place.

Your question is answered in the affirmative.

058-163—May 21, 1958

CITIES AND TOWNS

ENFORCEMENT OF MUNICIPAL ORDINANCE REGULATING MILK BY COUNTY HEALTH UNITS—CONSTRUCTION OF §154.04, F. S.

To: Tom Adams, State Senator, Orange Park

QUESTION:

May a municipal ordinance relating to the regulation of milk and milk products require its enforcement thereof by the county health officer or county health unit?

Where applicable, §154.04, F. S., provides that the duties and compensation of the personnel of county health units "shall be fixed and determined by the state board of health upon the approval of the board of county commissioners." The powers and duties of public officers are measured by the terms and necessary implications of the grant and must be executed in the manner directed. (See 43 Am. Jur., Public Officers, §249.)

In opinion 056-174, rendered by this office on June 14, 1956, we held that "the personnel of county public health units, including the county health officer, are state employees or employees of a department or branch of the state government created by statute." Municipal legislative, governmental or public power is applicable only within municipal limits and to the inhabitants thereof (*Hamler v. Jacksonville*, 94 Fla. 807, 122 So. 220. See also *North Bay Village Isle of Dreams Broadcasting Corporation*, 46 So. 496).

In light of the above, it is our opinion that a municipality, by ordinance or otherwise, does not have the authority to extend the jurisdiction or duties of a county health officer or of employees of county health units.

Your question is answered accordingly.

058-164—May 21, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
PAYMENT OF INTEREST BY COUNTIES—CH. 132, F. S.;
§6, ART. IX, STATE CONST.

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

1. May a board of county commissioners pay interest, or contract to pay interest, in the absence of specific authority of law, on deferred payments for property other than voting machines and buildings constructed pursuant to §§135.01 and 135.02, F. S., as follows:

a. Property purchased;

b. Property purchased under an agreement for deferred payments which are to be treated as rent if complete payment is not made, with the provision that the title of the property will pass to the county when the agreed amount is paid;

c. Property constructed under contract?

2. If a deferred payment for a purchase or contract of the nature described in the 1st question is not paid when due, may the board pay or contract to pay interest for an extension of the maturity date?

While neither the constitution nor the statutes of Florida provide that the state shall be immune from the payment of interest on its obligations, such immunity is declared an attribute of sovereignty and is implied by law for the benefit of the state. The same rule is likewise applied to governmental units of the state, including counties, (*Broward County Port Authority v. Arundel Corp.* (1953) 206 F. 2d 220) and in the absence of statute or express contract to the contrary, counties are not liable for interest on their obligations (*Duval County v. Charleston Engineering & Contracting Co.* (1931) 101 Fla. 341, 134 So. 509). Thus, in the absence of statute or a valid agreement for interest, county warrants do not bear interest even after demand and refusal to pay them for want of funds (*National Bank v. Duval County* (1903) 45 Fla. 496, 34 So. 894, 3 Ann. Cas. 457; *Board of Public Instr. v. Osburn* (1939) 101 F. 2d 919) and in the absence of statutory authority, county commissioners have no authority to pay interest to a bank for the use of the funds of the bank in cashing county warrants when the county has no funds to discharge them (*State ex rel. Walker v. Stewart* (1905) 49 Fla. 259, 38 So. 600; See also 24 A.L.R. 2d, *Interest—Against Governmental Unit*, §3, Ch. 966).

The counties have historically conducted their financial affairs on a cash basis, paying their obligations on the due date. The entire scheme for the administration of county fiscal matters; viz, the budget laws, the taxing power of the counties, authority to issue bonds, revenue certificates or tax anticipation certificates under applicable laws intends that counties have funds on hand to pay their contract obligations as they become due.

It is commonly understood that contracts contemplate payment to be made when the performance under the contract is completed. Nowhere is to be found constitutional or statutory authority for the boards of county commissioners contracting for property or services to make payment thereof on a deferred basis.

The county commissioners have no powers other than those expressly vested in them by statute or that must be necessarily implied to carry into effect, powers expressly vested, (*Crandon v. Hazlett* 26 So. 2d 638, 157 Fla. 574) and in keeping with this fundamental principle the constitution and laws of Florida authorize the board of county commissioners to incur certain types of contract obligations, where payments are made on a deferred basis, after compliance with certain provisions intended to safeguard the public against unauthorized expenditures.

The contract obligations referred to above are bonds, revenue certificates where authorized by act of the legislature, and general refunding bonds (§6, Art. IX, State Const., Ch. 132, F. S.).

I point out that:

Bonds, within purview of this section (Article IX, Section 6) are any contractual device for *present funding of tax revenues contemplated to be raised or made available for reimbursement in future years*, contrived to be issued as enforceable legal security to obligee, or his assignee, by means of which such obligee or his assignee will acquire legal or equitable right to coerce by judicial processes repayment of sum of money advanced on strength thereof, together with interest, however calculated or provided to be paid on sum so involved (*State v. Florida State Improvement Commission* 1950, 47 So. 2d 627). (Emphasis supplied.)

Where authority to incur obligations of this nature is granted, it is my opinion that such authority necessarily implies that the county pay interest on these obligations.

The several counties presently are using lease purchase agreements for the acquisition of property. Such agreements may be entered into so long as the rental paid pursuant thereto is not of an unreasonable amount or the agreement itself does not expressly, or by implication, provide that interest is being charged. If such payments are excessive or interest is charged thereon, they may be held invalid as violative of the budget laws or §6, Art. IX, State Const. (See *State v. City of Miami* 7 So. 2d 146). Any lease purchase agreement which falls within the category of bonds, as defined in *State v. Florida State Improvement Comm.*, supra, is invalid unless the provisions of §6, Art. IX, have been followed. It should be noted that revenue certificates, when authorized by act of the legislature, are valid and the authority to issue said certificates would, by implication, authorize the payment of interest by the county on such certificates. That is, they are valid unless tax revenues are also pledged to be raised in future years to assist in retirement of such certificates, and then only if the provisions of §6, Art. IX, State Const. are followed.

Where a county purchased real property subject to a mortgage, through a dummy nonprofit corporation, the scheme of financing was held invalid as one which indirectly or directly obligated the county to pay a sum with interest extending over a period of years, and was, in effect, an attempt to create a binding, continuing interest-bearing contract obligation to pay money in the future, which violates the intent of the provision of §6 of Art. IX, of the constitution granting power to issue bonds other than refunding bonds, "only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the free-holders who

are qualified electors residing in such counties, . . . shall participate" (Hollywood Inc. v. Broward Co. 90 So. 2d 47).

Since early in the legal history of this state the rule has been that under a duly authorized contract which provides for the payment of interest, a county is liable for interest after date of maturity on the obligation. (Jefferson Co. v. B. C. Lewis 20 Fla. 980; Jefferson Co. v. Hawkins 23 Fla. 223, 2 So. 362, See Also Anno. 75 A.L.R. 405.)

The immunity of the state and county from the payment of interest, unless such payment is authorized by statute, or is contemplated by a contract authorized by statute, does not extend to a county port authority as it is a business corporation as distinguished from a governmental unit such as a county or state (Broward County Port Authority v. Arundel Corp. 206 F. 2d 220).

It is my opinion that the boards of county commissioners of the several counties may contract to pay interest on county obligations only where they are by statute expressly authorized to enter into contractual arrangements providing for payment on a deferred basis. Inasmuch as the general operation expenses of a county are paid on a cash basis, there is no authority for the county to pay interest or incur deferred payment obligations for such expenses. Where the authority to issue revenue certificates does exist, such authority, by implication, though not expressed, would authorize the county to pay interest.

Where an authorized contractual arrangement contemplates by express provision or by implication, the payment of interest by the county, it is my opinion that interest is payable after the date of maturity of the contract obligation (Jefferson Co. v. Hawkins supra).

The authorities and comments contained herein answer the questions propounded as well as they may be answered generally.

058-165—May 21, 1958

TAXATION

INTANGIBLE TAX ON STOCK BOUGHT ON MARGIN THROUGH STOCK BROKERAGE FIRMS WITH BRANCH OFFICES IN FLORIDA, CH. 199, §199.04, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are stocks purchased on margin or other forms of credit through a branch office of a stock brokerage firm engaged in business in Florida, with its principal office in another state, subject to intangible personal property tax on its full value under Ch. 199, F. S.?

2. Is it the duty of the county tax assessor to determine whether specific brokerage firms are subject to the intangible personal property tax?

AS TO QUESTION 1:

The law of the case appears to be settled in the case of *Smith v. Lummus*, 6 So. 2d 625, in which the court held that a partnership domiciled in New York and conducting business as a commissioned broker for purchase and sale of securities, and who opens a branch agency in Florida for taking orders for purchase and sale of stock, and agents located in Florida have no power to pass on the credit standing of any prospective

customer or to do anything with the money received by them other than deposit it in a Florida bank to the partnership's account in New York; then accounts receivable from the customers would not have their "situs" within the state so as to be subject to the personal property tax. This case was cited in 143 A. L. R., 364, 365, 379 and 383 and 160 A. L. R. 791. This case outlines the general proposition that taxes are the contributions from persons and property levied by the state for the support of the government in its sovereign capacity, and the taxing power of the state, therefore, can only be used within its territorial limits and cannot, as a general rule, extend to intangible personal property of a nonresident which must be regarded as having its situs at the domicile of its owner. The court then sets out the following general rule and exception:

The purpose of taxation being collection of money by the sovereign to meet the public needs and the cost of the maintenance of government itself, it seems fundamental that there should be a corresponding privilege and protection for which taxation is imposed, therefore, if one domicile in one state is maintaining a business in another and receiving all advantages that the government of the latter and its various branches afford in the protection and the maintenance of the business, a resulting obligation arises on the part of the taxpayer to pay his proportionate share in taxes to the public exchequer. It seems to us from our study of the authorities that the exception to the rule that the tax on intangible personal property shall be levied at the domicile of the owners arises in those cases where, because of activity in another state involving the property, they receive such benefits and protection under the laws of that state that they should make a contribution to its government.

The case then came back before the court, 14 So. 2d 897, upon the specific question of whether the debit balances have a situs for taxation in the state, and in ruling that they did, the court set the five following reasons:

- (1) The customer resided in Florida.
- (2) The original payment was made by him in Florida at the branch office.
- (3) Interest and brokerage commissions were paid in Florida.
- (4) Florida law protects the branch office and business transactions had therein.
- (5) Florida courts provide forums for adjudication of differences arising out of the transactions.

For these reasons it would appear that the answer to this question would be in the affirmative if the balance due on the stocks or "debit balance" had its situs in the state under the rules for determining said question as outlined in the above case.

AS TO QUESTION 2:

Section 199.04, F. S., is in part as follows:

Intangible personal property shall be assessed by the tax assessor of each and every county in the state

In the case of *White v. Gapway Grove Corp.*, 55 So. 2d 573, the court held that the primary responsibility for valuation of intangible personal property for tax purposes was lodged with

the tax assessor, and his determination was appealable to the board of county commissioners sitting as a board of equalization.

For these reasons question 2 is answered in the affirmative.

058-167—May 23, 1958

TAXATION

EXEMPTION FOR MUNICIPAL PURPOSES—ORLANDO UTILITIES COMMISSION—§16, ART. XVI, §1, ART. IX, STATE CONST., §§192.52, 192.06 AND 192.08, F. S.—
CH. 24758, 1947

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Does the Orlando utilities commission have the same status as a municipality with regard to exemption from ad valorem taxes?

2. If it does not, would all land, buildings and equipment located in Brevard county be taxable by said county?

3. If not taxable in its entirety, would lands not actually used be taxable?

4. Would the inactive status of the land as of Jan. 1, 1958, render the land taxable?

5. Would any lands held by the commission for sale to other industries be taxable?

6. If this land and improvements are not taxable generally, would they be subject to any specific levy, such as central and southern Florida flood control or any special district levies?

AS TO QUESTION 1:

The Orlando utilities commission is a city agency with the power to operate the utilities for the city of Orlando with the consent of the governing body of the city, and therefore is similar to the city commission of Orlando (Ch. 24758, 1947 Special Acts of legislature as amended).

The relevant portions of §16, Art. XVI, State Const., provide that the property of all corporations shall be subject to taxation unless the property is held and used exclusively for a municipal purpose.

Section 1, Art. IX, State Const., authorizes the legislature to exempt by law property for municipal purposes. Pursuant to §1, Art. IX, the legislature enacted §192.52, F. S.:

The real and personal property of municipally owned and operated public utilities held and used exclusively for municipal purposes shall not be subject to ad valorem or personal property taxes.

See also §192.06, F. S.

From the above it would appear that the question is whether the property so held and used may be for a municipal purpose as contemplated by the constitution. In the case of *State ex rel Harper v. McDavid*, 200 So. 100, the court defined a municipal purpose as follows:

... what constituted a municipal purpose is a legislative question that should not be interfered with by the

courts in the absence of clear abuse of discretion. A municipal purpose is much broader in its scope than it was a generation ago. Under our system of jurisprudence, constitutional validity may be determined by practical operation and effect. Measured by this text, we cannot say that the legislature exceeded its power in pronouncing the properties of the Housing Authority held for a municipal purpose free from all forms of taxation. They are held not for profit, must be restricted to a low income group, and contribute materially to the health, morals, safety and general welfare of the people. They aid materially in reducing the cost of fire prevention and police protection

In the case of *City of Fernandina v. State*, 197 So. 454, the court further defined a municipal purpose as:

The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality.

The construction of an office building was considered a proper municipal enterprise in the case of *State v. City of Tallahassee*, 195 So. 402. In other decisions the court has approved airports, golf courses, school buildings and other structures as proper for a city to undertake. The furnishing of electric current was approved as a municipal purpose in *Jacksonville Electric Light Co. v. City of Jacksonville*, 18 So. 677.

The exemption inures to the property itself when held and used for municipal purposes. *The constitution makes no requirements as to its location* (*Saunders v. City of Jacksonville*, 25 So. 2d 648).

Property owned by a municipality is exempt from taxation only when used or intended to be used for some municipal purpose (1947 A.G.O. 184). Before a municipality is entitled to the exemption of property from taxation, it not only must own, not lease, the property, but it must also use the property exclusively, not partially, for municipal or public purposes (1939 A.G.O. 451. *Univ. Club v. Lanier*, 161 So. 78; *Orange State Oil Co. v. Amos*, 130 So. 707).

From the above this question should be answered in the affirmative.

AS TO QUESTION 2:

In light of the answer to question 1, question 2 need not be answered.

AS TO QUESTION 3:

In the case of *Smith v. Housing Authority of the City of Daytona Beach*, 3 So. 2d 880, the court held that the question of whether certain corporate property was such as should be exempt from taxation under constitutional provision giving the legislature power to exempt property held for municipal purposes, but making property of all corporations subject to taxation unless held and used exclusively for municipal or other designated purposes, must be established as a matter of fact and is not a matter of legislative definition. The court further held that property owned by the housing authority of a municipality, in order to be exempt from taxation, must be used exclusively for municipal or other purposes stated in the organic law, and the question of exemption turns on the nature of use, which is a question of fact. In the *Saunders v.*

City of Jacksonville, *supra*, the rule was that the property was exempt when *held* and *used* for municipal purposes.

From the above it would appear that the property not held and used for a municipal purpose would not come within the exemption from taxation and would be taxable.

AS TO QUESTION 4:

The relevant portions of §192.06(2), F. S. Annotated, are to the effect that all public property of the several cities, villages and towns, used or *intended* for public purposes, shall be exempt from taxation. The fact that there was no visible use of the property as of Jan. 1 would not of itself render the property taxable so long as it was used or intended to be used for public purposes.

AS TO QUESTION 5:

The criterion for exemption from taxation is the character of use to which the property is put and not character of ownership; and such exemption, being in the nature of special privileges, should be strictly construed against claimant and in favor of taxing power (*State v. Inter-American Center Authority*, 84 So. 2d p. 9).

No authorities have been found which define a municipal purpose to include a sale of lands to other industries, and for this reason question 5 should be answered in the affirmative.

AS TO QUESTION 6:

Though the organic law intends that the governmental functions and property of municipalities shall not be taxed, the constitution does not exempt the corporate business or proprietary activities of municipalities (*State ex rel Burbridge v. St. John*, 197 So. 131).

State lands may be assessed for drainage and the lien for drainage taxes may be made of equal dignity with the lien for state and county taxes. Constitutional and statutory exemption from taxation is limited to taxation for state and county purposes and has no reference to special assessment (*State v. Everglades Drainage District*, 20 So. 2d 397. *State v. Warren*, 57 So. 2d 337).

A "special assessment" is a peculiar species of taxation distinct from the general burden imposed for state, county and municipal purposes, in that it is a local or special charge placed upon land on the theory that such land thereby derives a special benefit (*State v. Caldwell*, 35 So. 2d 642).

Section 192.08, F. S., provides that no taxes or special assessments shall be levied by any taxing district, special taxing district or other governmental unit or agency created for purposes of taxation against lands or other property of the state *except* for the purpose of improving the actual physical condition of said lands or other property. . . . The taxes or special assessments lawfully imposed upon lands or other property owned by the said state or by its agency shall be in obligation only upon the lands or other property against which such taxes or special assessments are lawfully imposed. The provisions of this section shall apply to state lands or property now subject to taxes or assessments in any taxing district or special taxing district created prior to June 26, 1931.

In the case of *State v. Webb*, 49 So. 2d 93, the court held that there was no legal authority for imposing debt service and general operating taxes of the county on lands held for the state in the name of the game and fresh water fish commission; and

in A. G. O. 050-74, the lands of the game and fresh water fish commission lying within the boundaries of a drainage district were held not subject to the drainage assessment made by the drainage district, but the opinion was with the recommendation that the commission proceed by proper legal proceedings to obtain a court determination on the question.

From the above it would appear that the property well may be subject to a specific levy of taxes even though the land and improvements are not taxable generally.

058-168—May 23, 1958

PUBLIC LANDS AND PROPERTY

FIXING BULKHEAD LINES OFFSHORE FROM EXISTING LANDS—§253.122, F. S.

To: *Van H. Ferguson, Director, Trustees, Internal Improvement Fund, Tallahassee*

QUESTION:

Is establishment of a bulkhead line at the mesne high watermark throughout an extensive area proper compliance with Ch. 57-362?

Section 253.122, F. S. provides in part:

(1) Subject to the formal approval of the trustees of the internal improvement fund, the board of county commissioners of each county or governing body of any municipality, . . . , are hereby authorized on their own initiative to locate and fix a bulkhead line or lines *offshore from any existing lands or islands. . .*" (Emphasis supplied.)

The language itself shows that the legislature intended some line other than the high watermark. Actually, private ownership of lands riparian to navigable waters extends ordinarily to the high watermark (*Brickell v. Trammell*, 77 Fla. 544, 82 So. 221).

Fixing of a bulkhead line should be the result of study and mature consideration. It might properly be fixed considerable distance offshore or conceivably only an infinitesimal distance to the seaward of the high watermark. Where public beaches are involved there should be no fill at all if such would interfere with public rights in the waters. For various reasons there may be other situations where no fill at all should be permitted.

Each application must be considered under the particular facts and circumstances under which the local authority has established the bulkhead line.

This answers your question as definitely as possible.

058-169—May 23, 1958

CRIMINAL PROCEDURE

NOLLE PROSEQUI; ISSUANCE, COMMITMENT ON ISSUANCE, RELEASE FROM BOND—§903.32, F. S.

To: *J. Louis Carter, Clerk, Criminal Court of Record, West Palm Beach*

QUESTIONS:

1. Can a county solicitor issue a nolle prosequi

only before trial?

2. Is the clerk authorized to issue a commitment on a nolle prosequi?

3. Is an order of the court necessary to release the defendant or his bondsman after the entry of a nolle prosequi?

At common law, only the attorney general could exercise the power to enter a nolle prosequi on an indictment, and unless by statute the authority is transferred elsewhere, this power is still reposed in the several public prosecutors (see *Wilson v. Renfroe*, Fla., 91 So. 2d 857).

A nolle prosequi may be entered without the consent of accused at any time before the jury is empaneled, since most authorities agree that the jeopardy of accused does not begin until the jury is fully empaneled and sworn. Furthermore, the entry of a nolle prosequi at such time does not⁷ require notice to, or the presence of, accused.

In the absence of a statutory requirement, leave of court ordinarily is unnecessary to the entry of a nolle prosequi before the jury is empaneled, although thereafter leave may be required (22 C. J. S., §457, pp. 706, 707).

While this matter has never been judicially resolved in Florida, it would seem to be the better practice to obtain leave of court prior to entering a nolle prosequi after trial has commenced.

I find no statute on the subject in Florida. Therefore, in my opinion the above stated rule is applicable (see Biennial Report of the Attorney General, 1949-1950, Opinion 050-242, p. 184).

I find no authority that would preclude the prosecuting attorney from attempting to enter a nolle prosequi after the commencement of the case; however, since double jeopardy attaches in such instances, a more logical procedure to follow in cases, where the state realizes after trial has begun that it cannot sustain the burden of proof, would be to suggest to the court that it direct a verdict of acquittal on its own motion. In either case, it would make no practical difference, as affecting the status of the defendant, how the case is discontinued, after double jeopardy attaches.

Nolle prosequi is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further, either as to some of the counts of the indictment, or as to part of a divisible count, or as to some of the persons accused, or altogether. Upon entry on the record, it amounts to a dismissal or nullification of the particular indictment or information and renders nugatory any proceedings carried on subsequently under the same indictment or information.

It would therefore appear that after the entry of the nolle prosequi on the record the defendant and his bondsman would be automatically relieved from any obligation arising out of the charge represented therein. Also, there would remain no grounds upon which to base the issuance of a commitment in the premises. However, since §903.32, F. S. requires the court to enter an order cancelling the undertaking when the condition thereof is satisfied, the clerk's minutes should reflect that this provision has been appropriately followed.

058-170—May 26, 1958

INSURANCE

ANNUAL RENEWAL ENDORSEMENT OF FIRE POLICIES— RATE REDUCTIONS—§629.06, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTIONS:

A fire insurance policy issued in this state contains an endorsement which gives to the assured the option of renewing his policy for four consecutive years by the payment of a premium calculated at 80% of the rate at which the policy was issued. Subsequent to the payment of the initial premium the rating organization to which the insurer belongs files and has approved a downward revision of its rates but with a 90% term discount factor in renewal endorsements.

1. If a company offers to an assured the lower rate approved subsequent to the issuance of his policy, is the company **OBLIGATED** to apply the 80% discount factor provided in the original endorsement?

2. Under the same conditions, **MAY** a company use the original term discount factor?

An insurance contract with a renewal endorsement creates a right in the assured to renew the policy at a stated per cent of the initial premium. If during the life of the policy, fire insurance rates are reduced, no legal right to these rates exists to assureds under existing policies. The contracts remain in force according to their original terms. It is the custom, however, for companies to offer their assureds the lower rates at the first subsequent renewal date and this has been permitted by your office. Companies are not obligated to do this but do so for competitive reasons.

If a company offers an assured a lower basic rate which it is not obligated to offer, it is elementary that the company may attach as a condition the higher discount factor. For example, suppose the initial premium was \$100 with the 80% discount factor. The renewal premium would be \$80. If the rates have been changed to make the initial premium for this risk \$85, then the company may offer the assured the \$85 rate with the new 90% discount factor which would result in a renewal premium of \$76.50. The assured is not obligated to accept the new rate and new discount factor but if offered to him he will accept it if the resulting renewal premium is to his advantage. The new rate structure is approved as a whole and it goes without saying that the lower basic rates are calculated in contemplation of the higher discount factor on renewals. Your 1st question is answered in the negative.

Section 629.06, F. S., provides that fire insurance rates shall not unfairly discriminate between risks in this state involving essentially the same hazards. If a company offered to an assured the lower basic rates under the new rating structure and the lower discount factor under the old rating structure, the resulting premium would be lower than that provided under either the old rating structure or the new rating structure. For instance, using the same figures as above, the new basic rate

of \$85 at the old discount factor of 80% would result in a renewal premium of \$68, whereas a new policy would require a renewal premium of \$76.50 (90% of \$85) and an old policy would require a renewal premium of \$80 (80% of \$100). An assured has a contractual right to the renewal premium computed under the rating structure in effect at the time his contract of insurance was issued. It would not constitute discrimination if he were offered a renewal premium computed under the new rating structure. Discrimination would result if he were offered a combination of the old and the new rating structures which would have the effect of offering him a renewal premium lower than the old or the new rating structures contemplate. Your 2nd question is also answered in the negative.

058-171—May 29, 1958

TAXATION

TAX SALE CERTIFICATES—CLERK'S ASSIGNMENT FEE AS INCLUDED IN AMOUNT NECESSARY TO REDEEM—

§§193.51-193.54, 193.56, 193.60, 194.11, 194.13 AND 194.62, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the 50¢ fee charged by the clerk of the circuit court, in connection with the transfer of tax sale certificates included in the amount necessary to redeem such certificates, and, as such, to be reimbursed to the certificate holder?

The purpose of the laws concerning tax sale certificates and tax deeds is to provide a method to insure the collection of state and county taxes. In keeping with this purpose, tax sale certificates may be acquired by certificate holders by either of two methods. A certificate may be issued to one purchasing at the public sale conducted by the tax collector, or the certificate may be acquired by purchase from the clerk of the circuit court after said certificate has been issued to the county (§§193.51, 193.52, 193.53, 193.54 and 193.56, F. S.).

After issue, tax sale certificates may be transferred by endorsement whether issued to the state, county, or individuals (§193.60, F. S.).

Where the tax certificate is issued to the state, county, and unless otherwise provided by law, to municipalities, title to said certificate is transferred, from the political subdivision to the purchaser of the certificate, by the clerk of the circuit court's endorsement thereon, and payment of taxes represented by said certificate, together with the required interest and fees of the clerk, including a fee of 50¢ for the endorsement of the clerk on said certificate (§194.11, F. S.).

A tax sale certificate may be redeemed by the person entitled to redeem same, by payment of all taxes, interest, costs, and charges as provided by law upon the part or parts of the land so redeemed (§194.13, F. S.). The fee of the clerk of the circuit court in connection with a tax certificate issued to a political subdivision and purchased by assignment, is a lawful charge payable at the time of redemption of said certificate.

The assignment and transfer contemplated by §194.11, F. S., is limited to the transfer of tax certificates from a political subdivision to the certificate purchaser. This provision does not extend to a voluntary transfer of a tax certificate made by the purchaser to a subsequent transferee.

Where a tax certificate is originally issued to other than the county and subsequently redeemed, no assignment as contemplated by §194.11, F. S., has been made, therefore, the fee of the clerk for his endorsement under said section is not to be charged as a part of the redemption cost since it has not been paid. Only when the original tax sale certificate is held by the county and is subsequently transferred to another by the endorsement of the clerk, does the endorsement fee of the clerk become a part of the redemption cost.

The recording of tax sale certificates is authorized by §194.62, F. S., and as in the recording of other instruments, the clerk is authorized to charge a fee at the time of recordation. The purpose of this section is to provide a method for protecting the certificate holder's interest, and any fee charged by the clerk for recordation of the tax certificate is not to be considered a part of the cost or charges payable at the time of redemption of said certificate.

It is my opinion that the fee charged by the clerk of the circuit court, in connection with the assignment of the tax certificate held by a political subdivision to a purchaser of said certificate, is properly included within the amount necessary to redeem said certificate and, as such, should be refunded to the certificate holder at the time of redemption.

The question propounded is answered in the affirmative.

058-172—June 3, 1958

OFFICES, OFFICERS AND PUBLIC RECORDS
RETROACTIVE ISSUANCE OF NOTARY PUBLIC'S
COMMISSION—§117.08, F. S.

To: *William L. Durden, Administrative Assistant to the Governor, Tallahassee*

QUESTION:

Does the governor have the authority to issue a notary public's commission nunc pro tunc to validate the acts of a notary public performed after the expiration of a former commission?

I find no expression of the legislature which grants the governor authority to perform the act in question and, therefore, I am inclined toward the position that the governor does not have the authority to issue a notary's commission retroactively so as to make it valid ab initio from the termination of a previous commission.

The legislative expression appearing in §117.08, F. S., appears to lend support to this proposition. Section 117.08, F. S., provides:

Notary public acting after expiration of commission.—

Every notary public in this state who shall take any acknowledgment of any instrument as a notary public, or who makes any certificate as such, after the expiration of his commission, shall, upon conviction, be punished by fine not exceeding one hundred dollars, or by imprisonment not to

exceed three months.

In an attorney general's opinion written by a predecessor in office, Hon. Fred Davis, dated Dec. 16, 1930, found at p. 195 of the 1929-1930 Biennial Report of the Attorney General, the following language is found:

I am unable to find any lawful way by which you can pre-date the Governor's commission of a notary public, so that the same will be dated as of a day prior to the actual filing of the notary public bond in the office of the Secretary of State as provided by law. . . . (Emphasis supplied.)

In *Williams v. State*, 23 Ala. App. 365, 125 So. 690, the Alabama supreme court held that the acts of a notary performed 15 months after the expiration of his commission were *not* valid.

I am not unaware of the statements found in the sections of *Corpus Juris Secundum* and *American Jurisprudence* dealing with notary publics to the effect that the validity of a notary's acts as to third persons is not affected by the expiration of his commission (see 66 C. J. S., *Notaries*, §5, 29 Am. Jur., *Notary Public*, §13). Two cases are cited for the principles set out in the above mentioned legal encyclopedia, *Davenport v. Davenport*, 116 Fla. 1009, 41 So. 240, and *Williams v. State*, *supra*. As pointed out above, the *Williams* case (Ala.) holds the acts of a notary performed after the expiration of his commission invalid. The *Davenport* case (La.) involved a distinguishable situation. In that case the notary was the principal notary of the parish and he was deemed to hold office until his successor was qualified as would other officers of government. It is admitted, however, in *American Jurisprudence* that "since in most jurisdictions many notaries are appointed at large and not to succeed any particular notary whose term has expired, it is doubtful whether the first proposition receives general sanction" (39 Am. Jur., *Notary Public*, §13).

Furthermore, it is to be noted from §117.07, F. S., that in Florida a notary is required to supplement his seal and signature with a statement indicating the date of the expiration of his commission. If the notary complied with this law then third parties would be on notice that the notary's commission had expired. Compliance with §117.07 is so common among notaries that a notary's failure to comply would perhaps be a *prima facie* indication of fraud and deceit on the part of the notary in which case the third party could then maintain an action against the notary. In any event, third parties appear protected in Florida and the comments of *American Jurisprudence* and *Corpus Juris Secundum* mentioned above are considered inapplicable to the determination of this issue in this jurisdiction.

Based on the authorities and comments set out above, it is my opinion that the governor has no authority to issue a notary's commission *nunc pro tunc* to validate the acts of that notary public performed after the expiration of his previous commission.

058-173—June 4, 1958

CRIMINAL PROCEDURE

STAY OF EXECUTION TO FINE—EFFECT OF DEATH OF PERSON CONVICTED ON SURETY ON BOND—§921.15, F. S.

To: R. H. Amidon, Judge of Criminal Court of Record, Bartow

QUESTION:

On April 14, 1958, a defendant was sentenced by the criminal court of record of Polk county to pay a fine of \$500 and, in default of such payment, to serve 6 months in the county jail. He put up a 90-day bond under §921.15, F. S. to secure the payment of said fine and thereafter committed suicide on May 5, 1958. The surety on the said bond has filed a petition for an order adjudging that the prosecution, including the judgment and sentence, abated upon the death of the defendant. Should said fine be abated and said bond cancelled?

I think that the weight of authority and sound reason support the proposition that a criminal action, including any fine imposed, abates upon the death of the defendant.

In 22 C. J. S. 263, Criminal Law, §165-b, we find the following comment:

In a criminal prosecution, the purpose of the proceeding being to punish accused, the action must necessarily abate on his death, and, where it is made to appear that plaintiff in error died pending the determination of his appeal, the cause will be abated.

In 15 Am. Jur. 186, Criminal Law, §553, it is said:

As a general rule, though not one without exception, a judgment imposing a fine and imprisonment in a criminal case abates on the death of the defendant pending a writ of error, and the fine cannot be enforced against his estate.

In *State v. Kriechbaum* (Iowa), 258 N.W. 110, 96 A. L. R. 1317, the supreme court of Iowa said:

It is almost the universal holding of the courts, federal and state, that the death of a defendant in a criminal prosecution abates the action. The abatement is deemed to be the necessary result of the death and is not subject to any judgment or discretion of the court. *The abatement applies not only to the pending proceedings in the appellate court, but applies likewise to all procedure had ab initio in the court below, including the verdict and judgment of conviction.* (Emphasis supplied.)

In *State v. Furth* (Wash.), 144 P. 907, the supreme court of Washington said:

The courts of the country, both state and federal, have, with marked unanimity, held that the death of the defendant in a criminal case pending appeal, in the absence of a statute expressing the contrary, permanently abates the action *and all proceedings under the judgment*. They make no distinction between a sentence of imprisonment and the imposition of a fine. *The underlying principle is that the object of all criminal punishment is to punish the one who committed the crime or offense, and not to punish those upon whom his estate is cast by operation of law or otherwise.* (Emphasis supplied.)

As was said by the Criminal Court of Appeals of Oklahoma in *Boyd v. State* (Okla.), 108 P. 431:

A civil action does not abate by the death of a party if the cause of action survive or continue, *but in a criminal action the sole purpose of the proceedings is to enforce the criminal law and punish the person found guilty of a violation thereof. The personal representative of the deceased is not responsible for the alleged violation of the law by the defendant during his lifetime, and cannot be required to satisfy the judgment rendered against him. It is only the person adjudged guilty who can be punished, and a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist. (Emphasis supplied.)*

I also quote from *United States v. Dunne*, 173 F. 254, as follows:

The rule that a statutory penalty merged in the judgment becomes a debt, and may be recovered from the estate of the judgment debtor, does not apply in this case. The indictment was under section 1782 of the Revised Statutes (6 Fed. St. Ann. 606), providing that every person offending against the statute should be deemed guilty of a misdemeanor, and should be imprisoned and fined. The verdict of the jury was guilty. The judgment imposed a punishment of a fine and imprisonment as provided by the statute. This judgment is before us, and is made the basis of the claim of the United States against the estate of the defendant. For the present purpose it is an indivisible judgment and wholly penal. It cannot be separated into parts, and one part kept alive as an indemnity, while the other, as a penalty, perishes with the death of the defendant. "Upon the face of the record the action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender"

See also cases cited in the annotations found in 19 Ann. Cas. 1147-1148 and 96 A.L.R. 1322 et seq.

I am therefore of the opinion that the death of the defendant mentioned in your letter before payment of his fine abated the fine and rendered it uncollectable. I also think that the death of the defendant relieved the surety on his bond because the bond, given under §921.15, was "conditioned for the payment of the fine" and because the fine is no longer owing, it having been abated by the defendant's death.

Consequently, I think that it would be proper for you to enter an order in the case mentioned in your letter, reciting the facts and adjudging that the defendant's death abated the fine imposed upon him and relieved the surety of liability on said bond, and cancelling the bond.

058-175—June 5, 1958

**SALT WATER FISHERIES AND CONSERVATION
MANATEES, TAKING AND POSSESSION OF—CONSTRUCTION OF §§370.10(2) AND 370.12(2), F. S.**

To: Ernest Mitts, Director, State Board of Conservation, Tallahassee

QUESTION:

May the state board of conservation issue a permit or certificate for the taking of more than one manatee in this state?

Subsection (2) of §370.10, F. S., provides:

The state board of conservation may issue certificates, upon such terms, conditions, and restrictions as it may prescribe, to any properly accredited person permitting him to collect and have in possession salt water fish, including shell fish and *aquatic mammals*, for experimental, scientific and exhibitional purposes. The certificate issued may permit the holder thereof to take and catch food fish or shell fish for use in feeding specimens of fish or *aquatic mammals* in aquariums. . . . (Emphasis supplied.)

Subsection (2) of §370.12, F. S., provides that:

Whenever the state board of conservation shall be satisfied that the interests of science will be subserved, and that the application for a permit to capture a *manatee* or sea cow is for a scientific purpose and should be granted, it may grant to any person making application a special permit to capture a *manatee* or sea cow, which permit shall only extend to the capturing of one of such animals. . . . (Emphasis supplied.)

Although each of the above provisions was contained in Ch. 28145, 1953, it also appeared in Florida Statutes, 1941, and subsequent statutes prior to the enactment of the said 1953 act. The quotation from §370.10(2), *supra*, was taken verbatim from former §373.08; and the quotation from §370.12(2), *supra*, was taken from former §374.18, F. S., with no material change. Former §373.08 was taken from Ch. 17916, 1937, and former §374.18 was taken from Ch. 4208, 1893. An examination of said Ch. 28145, 1953, including the preamble thereto and title, reveals that it was intended as a general revision of existing statutes and laws, including portions of then existing Ch. 371 and all of Chs. 373, 374 and 375, F. S.

A manatee is defined in Webster's dictionary as "any of several aquatic herbivorous mammals of the order Sirenia which constitute the genus *Trichechus*. . . . The American species inhabits the waters of the West Indies and neighboring mainland coasts from Florida to Yucatan." (Emphasis supplied.)

The term "aquatic" is defined by the same dictionary as "of or pertaining to water; living in, or frequenting the margins of, water; growing in water; an aquatic animal or plant." Under the definition of "mammalia" (mammals), in the same dictionary, we find the statement that "although most animals are terrestrial or arboreal, many are aquatic, as whales, seals and manatees. . . ." (See also the New Standard Encyclopedia, under the heading "manatee.")

From the above it appears a manatee is a species of *aquatic*

mammal or animal and therefore within the purview of both §370.10(2) and §370.12(2) F. S. Under §370.12(2) the taking of only one manatee is permitted, while under §370.10(2) there is no limitation upon the number of aquatic mammals to be taken or possessed.

It would appear, therefore, that §370.12(2), F. S., qualifies §370.10(2), F. S., to the extent that a special permit for the taking of the species of aquatic mammal known as the manatee or sea cow would limit the permittee to the taking of one manatee or sea cow. However, this exception to the generality of §370.10(2), *supra*, is subject to the rule of strict construction (Sutherland Statutory Construction, 3rd Ed., §4936, p. 474). The application of such rule to §370.12(2), *supra*, would restrict its application to the "capture" or taking of a manatee or sea cow and not necessarily to the number that might be ultimately possessed. So long as the taking or capture of a manatee by a qualified permittee was for a "scientific purpose" there would be no legal objection to the ultimate confinement of the manatee with another or other manatees previously possessed by other qualified permittees when the justification for the original taking no longer exists and the pooling of such manatees is for a "scientific purpose." However, once the justification predicated on a scientific use or purpose ceases to exist, the permittee or possessor has a duty to return the manatee or manatees to their natural habitat.

The foregoing comports with the often indulged legal presumption that the legislature never intended to enact or re-enact contradictory enactments, or to effect the repeal of a law without expressing a clear intent in such regard (*St. Petersburg v. Pinellas County Power Co.*, 87 Fla. 315, 100 So. 509; *State v. Givens*, 48 Fla. 165, 37 So. 308; *Wilson v. State*, 50 Fla. 164, 39 So. 471; *Dade County v. Miami*, 77 Fla. 786, 82 So. 354; *State v. Simpson*, 94 Fla. 789, 114 So. 542; *Armistead v. State*, 41 So. 2d 879; *Ellis v. Winter Haven*, 60 So. 2d 620). It is also in harmony with the rule which holds that if two statutes may be reconciled upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given their designated effect unless a contrary intent is clearly apparent (*State v. Gadsden County*, 63 Fla. 620, 58 So. 232; *Stewart v. DeLand-Lake Helen Special Road, etc.*, Dist., 71 Fla. 158, 71 So. 42; *American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524; *Arnold v. State*, 147 Fla. 324, 2 So. 2d 874). Opinions of this office have consistently adhered to the principle that amendments by implication are not favored in law. Before declaring that one statute repeals another by implication, it should be shown that the statute later in point of time was intended to be a revision of the subject matter of the former, or that such a positive and irreconcilable repugnancy exists between the two statutes as to clearly indicate that the latter statute was intended to prescribe the only rule which would govern, and that there is *no area* in which the provisions of the statute first in point of time could operate lawfully without conflict (see 1958 A. G. O. 058-53).

In light of the foregoing, and in summary, it is our opinion that although it is legally conceivable that a person may ultimately possess more than one manatee or sea cow for scientific purposes, §370.12(2), *supra*, limits a qualified permittee to the capture or taking of only one manatee.

Your question is answered accordingly.

058-176—June 5, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
CANCELLATION OF BONDS OF PUBLIC OFFICIALS**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a state or county officer is required to give bond for a specific term, may the bond be cancelled prior to the expiration of the term designated therein?

Public officials of the state and county are required by pertinent laws to give bond conditioned upon the faithful performance of their official duties, the proper handling of public moneys or conditioned upon the payment of all damages resulting from any illegal act of said officer.

Protection of the public interest in the office is the fundamental principle underlying the requirement that official bonds, with the state or county as obligee, be given by public officers. In keeping with this principle, certain official bonds must be approved by designated officers prior to becoming operative. Bonds, in order to be binding obligations, must not only be executed and delivered by the obligor, but must also be accepted by the obligee. If for any reason, an obligee in a bond refuses to accept it, the bond does not become operative, and no liability on the maker arises thereunder (11 C. J. S., Bonds, §21).

Sureties, on official bonds, ordinarily are discharged from liability by the acceptance of a new bond, and a surety who signs the bond without the consent of the original surety, and subsequent to its approval, is regarded as signing a new bond, the acceptance of which discharges the old surety from all liability for acts subsequent to the making of the new bond. It should also be noted that an official bond is not satisfied by its cancellation by an unauthorized officer (67 C. J. S., Officers, §165).

A bond is a contractual arrangement whereby the surety as obligor undertakes to indemnify the obligee for defalcation on the part of the named principal. Where a bond is given by a public official for a specified term and has been approved and accepted by the obligee, said bond becomes a binding contract obligation for the term specified therein. Like other contracts, it may be terminated by agreement of all parties thereto. In the absence of an agreement for termination by all parties concerned, it appears from the above authorities that the acceptance of a new bond proffered as a substitution for the present bond would, in effect, terminate the original bond as of the date of the approval and acceptance by the state. In this connection the liability for defalcation of the principal occurring prior to termination of the original bond would remain with the original surety.

Inasmuch as the comptroller has for a long period of time held that no substitution may be made for official bonds given for a designated term during said term, it is my opinion that such determination by the comptroller would be upheld, unless a showing is made that it is clearly erroneous (*Florida Industrial Commission v. Manpower Inc. of Miami*, 91 So. 2d 197). Apparently, the basis of the comptroller's ruling is that where acts of the principal resulted in liability of the surety it would be extremely difficult, and perhaps impossible, to determine which surety was liable where a new bond was substituted during a

specified term. In my opinion this is a reasonable basis for the comptroller's holding. However, since the approval of an official bond by the comptroller is a discretionary matter, as distinguished from a ministerial act, the comptroller may, if he so desires, accept a substitute bond with the agreement of all parties concerned.

In the event the comptroller, in the exercise of his discretion, authorizes the termination of an official bond as of a specified date, termination of said bond may only be made by agreement of all parties concerned. This agreement should be in writing and executed in the same manner as the bond being terminated. It should expressly provide that liabilities of the surety for defaults of the bonded officer are covered by the bond being terminated up to and including the date of termination of said bond. Thus, unequivocally, the terminated bond will be inoperative beyond the termination date.

The comptroller, in the acceptance of a bond substituted for one being terminated, should exercise extreme caution that the beginning date of the undertaking in the new bond coincides with the termination date of the bond being cancelled.

Subject to the qualifying procedures outlined herein, the question propounded is answered in the affirmative.

058-178—June 6, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
RECOVERY OF AMOUNTS ALLEGED TO BE OWED BY FORMER
COUNTY OFFICIALS—§§17.20, 125.01, 125.15, F. S.**

To: LeRoy Collins, Governor, Tallahassee

QUESTION:

Should it be determined that any amounts of money are due Santa Rosa and Okaloosa counties by former county officials, what course of action should be taken to collect the same?

Among the duties of the board of county commissioners is to represent the county in the prosecution and defense of all legal causes (§125.01(3), F. S.) and to sue and be sued in the name of the county (§125.15, F. S.).

In the case of *Molwin Inv. Co. v. Turner et al*, 167 So. 33, the court held that an express power duly conferred upon a county may include implied authority to use means necessary to make the express power effective, and that the counties have a property interest in the fees of county officers in excess of the net income allowed to such county officers. The county commissioners have the primary responsibility of seeing that the fees of such officers are reported and proper payments made to the county.

The power and duty of the board of county commissioners to represent the county in the prosecution and defense of all legal causes as shown above carries with it the necessary implication that counsel may be employed when, in the judgment of the board, the interests of the county require the services of counsel (*State ex rel Himes v. Culbreath*, 174 So. 422).

This duty vests in the board's broad discretionary powers to the end that the interests of the counties in all legal causes and controversies in which they may be involved shall be adequately served. Any action taken by the board of county commissioners on any subject within the authority given such board by statute

is not reviewable by courts in the absence of fraud or abuse of discretion clearly shown (*Davis v. Keen*, 192 So. 200).

Among the enclosures with your letter of May 28 is a copy of Grand Jury Report for Winter Term 1958, which is in part as follows:

We request that the State Attorney, who is the legally constituted officer in regard to collecting these monies," (monies allegedly due from former county officers) take any steps that are necessary in the collection for the county.

No authority can be found to require the state attorney to institute proceedings to collect accounts due to the county by a former county official. The grand jury is obviously referring to the authority of the comptroller to charge state attorneys with claims which he has placed in their hands for collection of money *for or on behalf of the state* (§17.20, F. S.). This authority clearly appears to be confined to collections of money due the state. Although the bond under which the county officials served is made payable to the governor of Florida, any monies collected from them would be for the use and benefit of the counties.

From the above statutes and authorities, it would appear that the board of county commissioners should institute a suit to recover any monies owing because of the failure of a former officer to pay into the county treasury monies which he was required by law to so pay; said suit to be on his official bond and to be brought in the name of the governor for the use and benefit of the county involved against such former official and the sureties on his bond.

Also, if there be any monies which have been paid to the former county official by the county in the form of overcharges, and if such monies be recoverable under the rule laid down in the case of *Davis v. Keen*, 192 So. 200, the county commissioners should institute suit in the name of the county against such former county official for such sums.

058-179—June 9, 1958

HIGHWAYS AND BRIDGES

COUNTY ROAD SYSTEM—ROAD AND BRIDGE FUND—APPLICATION OF CH. 30068, 1955, SPECIAL TAX ASSESSMENT—SARASOTA COUNTY—§125.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Does this board have the power to use tax revenues to provide for financing road improvements under Ch. 30068?

2. If so, may these revenues be levied under the general revenue fund?

An examination of Ch. 30068, reveals that said chapter authorizes the county of Sarasota, upon proper petition by the affected property owners, to levy special assessment taxes for the paving, grading, drainage, etc. of county roads. Said chapter also provides that any portion of the cost of such improvements, not levied as a special assessment against the property benefited, may be borne by the county.

A further provision of this chapter is to the effect that if special assessments levied pursuant thereto remained unpaid for

a period of 30 days after due date, said assessment then may be paid over a period of several years. Nowhere in the act appears authority for the present funding of those special assessments which will be collected over a period of years.

The correspondence file submitted with your request indicates that the county road and bridge fund is presently being used to pay the contract obligations arising in connection with this chapter. The tax authorized to be levied under this section is easily distinguished from funds accruing by virtue of general taxation or general road and bridge funds, in that the levies contemplated by this chapter are limited to an assessment for special benefits and may be made only against the property benefited.

The constitutional provisions and pertinent laws relating to the road and bridge fund and the county road system contemplate that those funds be used only in accordance with the duty of the county commissioners to contract and maintain county roads (§125.01, F. S.).

Inasmuch as the assessments under this chapter have as their basis special benefits to particular property there appears to be no authority whereby general road and bridge funds or any other general county funds may be used for the payment of contract obligations in anticipation of special assessments to be collected in future years.

058-180—June 10, 1958

CRIMINAL PROCEDURE

BAIL BONDS—BAIL BONDSMEN—LIMITED SURETY
AGENTS—§§903.35, 903.37, 903.50 AND 903.23, F. S.

To: *Quentin V. Long, Assistant State Attorney, Broward County,
Fort Lauderdale*

QUESTIONS:

1. In construing Ch. 903, F. S., and particularly §§903.35 and 903.50, is it required that each limited surety agent register with the clerk of the circuit court and the sheriff's office in each county in which he does business, or is his registration with the clerk of the circuit court and the sheriff's office in the county in which he resides sufficient to satisfy these two sections?

2. In the event that a deputy sheriff approves a bail bond in a county in which the limited surety agent does not reside and has not registered with either the clerk of the circuit court or the sheriff's office, although the limited surety agent has registered in the county in which he resides with the clerk and the sheriff of the county, is said deputy in violation of the criminal aspects of §903.35, as construed in light of §903.50?

3. Would the failure of the limited surety agent to register with either the clerk of the circuit court or the sheriff of the county in which the bond is written and accepted by the sheriff invalidate the bond so that the surety company would not be liable thereon?

4. Did the omission to completely fill in the blanks in the powers of attorney which you sent to me invalidate the attached bonds which were purportedly executed under authority of said powers of attorney?

AS TO QUESTIONS 1 AND 2:

A limited surety agent is a bail bondsman (§903.37(3), F. S.) and §903.50, F. S., reads as follows:

903.50 *Registration of bail bondsmen.*—No bail bondsman shall become a surety on an undertaking unless he has registered in the office of the sheriff and with the clerk of the circuit court *in the county in which the bondsman resides* and he may register in a like manner in any other county and any limited surety agent shall file a certified copy of his appointment by power of attorney from each insurer which he represents as agent with each of said officers. Registration and filing of certified copy of renewed power of attorney shall be performed annually on October 1. The clerk of the circuit court and the sheriff shall not permit the registration of a bail bondsman unless such bondsman is currently licensed by the commissioner. (Emphasis supplied.)

I interpret §903.50, *supra*, as requiring the registration of a limited surety agent only in the county in which he resides but as permitting such registration in any other county. Therefore, it is my opinion that such agent's registration with the clerk of the circuit court and the sheriff's office in the county in which he resides is sufficient to satisfy the requirements of said §903.50.

Section 903.35, F. S., reads as follows:

903.35 *Officer taking insufficient bail.*—Any official who takes bail, which he knows to be insufficient, or accepts a surety in an undertaking knowing such surety not to possess the qualifications or sufficiency required by law, or accepts as surety any professional bondsman who is not duly registered with the clerk of the circuit court, and qualified to act as surety, shall be guilty of a misdemeanor, and upon conviction, shall be imprisoned not exceeding thirty days or fined not exceeding one hundred dollars, and may be removed from office by the governor.

It is my opinion that when a limited surety agent has registered and otherwise complied with §903.50 in the county in which he resides, his failure to do the same in another county in which the bond is delivered to and approved by a deputy sheriff does not cause the bond or the surety to be insufficient within the contemplation of §903.35 and does not subject the approving deputy sheriff to prosecution under said section.

AS TO QUESTION 3:

If the limited surety agent has registered and otherwise complied with §903.50 in the county of his residence, it is my opinion that a bond made by him in another county under a valid power of attorney would not be invalidated by the fact that he has not also registered in the county in which the bond is made.

Moreover, if a bail bond is made by a limited surety agent in the county of his residence under a valid power of attorney, I do not think that such bond would be invalidated because of his failure to comply with §903.50 in that county. Section 903.50 not only requires such an agent to register with the clerk and sheriff in the county of his residence, but it also requires him to furnish each of them a certified copy of his power of attorney from each insurer which he represents as agent. I think that these requirements are for the benefit of clerks, sheriffs and other officers who deal with

bail bonds, so as to make available to them a ready means of ascertaining whether a particular limited surety agent is in fact authorized by a surety company to make a particular bail bond. I do not believe that these requirements were laid down for the benefit of surety companies or to enable them to avoid liability on a bail bond because of their agents' failure to comply therewith. If a limited surety agent is authorized by valid power of attorney to make a bond, it seems to me that his company would be liable on the bond without regard to his compliance or noncompliance with §903.50.

AS TO QUESTION 4:

This question involves the sufficiency of four special powers of attorney to authorize the execution of the four attached bail bonds, each for \$2,500.

You sent me photographic copies of said bonds and powers of attorney. It may be that the machine used to make these copies failed to reproduce all that actually appears on their face; however that may be, the comments which follow will deal with what is shown by the photographic copies received from you.

The four powers of attorney are numbered 3195, 3196, 3350 and 3351. Each is attached to one of the four \$2,500 bonds, and a footnote to each bond refers to the number of the attached power of attorney.

Each of the powers of attorney is a special one, as distinguished from a general one, since it purports to authorize the execution of only one bail bond, specifically stipulating that it "can only be used once."

No attorney in fact is named or otherwise identified in either 3195 or 3196. Therefore, I do not think that these powers of attorney are legally sufficient to authorize the execution of the attached bonds by the attorney in fact who signed said bonds.

Each power of attorney contains a blank line for the insertion of the name of the defendant in whose behalf the bail bond was to be executed. Under this blank line are printed the words, "Name of Defendant must be inserted by Attorney-in-Fact." However, no defendant is named in any of the four powers of attorney. Also, each power of attorney has a blank line upon which to show the name of the court which the defendant is to answer, but no court is named in any of them. These omissions raise a grave doubt as to the sufficiency of any of the powers of attorney to authorize the execution of the attached bonds.

Each power of attorney contains the following: "provided that the authority of such Attorney-in-Fact to bind the Company shall not in any event exceed the sum of _____ on any one bond." No sum is inserted in 3195 and 3196 but I do not think that this omission invalidates either of the attached bonds. A printed footnote to each of said powers of attorney specifies, "This power of attorney shall not be valid in an amount over \$5,000," and the bond attached thereto is for only \$2,500. If the surety company wished to limit the power of attorney to a sum less than \$2,500, I think that it had the burden of inserting a lesser amount in the blank space left for that purpose, instead of leaving that space blank and specifying a maximum of \$5,000 in said printed footnote.

Each power of attorney contains a provision that, "This power of attorney is not valid unless used on or before _____." No expiration dates appear in powers of attorney 3195 and 3196. However, they were dated Nov. 12, 1957, and the bonds attached

thereto were dated April 11, 1958. I do not believe that the failure of the company to specify expiration dates in these powers of attorney had the effect of invalidating the attached bonds, especially since it appears that the bonds were executed within a reasonable time after the execution of the powers of attorney and were presumably accepted and approved without notice that the powers of attorney had been revoked or terminated.

It may be that the actions or inaction of the company subsequent to the execution of the bonds would estop it from denying liability on account of the above-mentioned omissions from said powers of attorney (see: 2 Am. Jur. 186, Agency, §232; *Branford State Bank v. Howell Co.*, 102 So. 649; *Ball v. Yates*, 29 So. 2d 729). However, no facts evidencing an estoppel appear in the documents which you sent me. I therefore suggest that the surety company be given an opportunity to rectify the situation as to the four bonds in one of the three following ways:

(1) If the attorney in fact had a general power of attorney which authorized the execution of these bonds independently of said special powers of attorney, the company could furnish four certified copies of said general power of attorney to be attached to the four bonds as evidence of the authority of the attorney in fact to execute them.

(2) The defendant in each case can make a new bond executed by the surety company as surety through its proper officers or through an attorney in fact who attaches to the bond a sufficient power of attorney.

(3) The surety company can ratify the execution of the bonds in its name. Any such ratification should be done by the board of directors and should be recorded in the board's minutes. If this course is followed, four certified copies of the minutes showing the ratification should be attached to the bonds to evidence their validity.

If neither of said three courses is followed, I suggest that an application be made in each case under §903.23 to the court in which the defendant stands charged, for an order directing his arrest and commitment until he makes good and sufficient bail in the amount specified by the court.

058-181—June 12, 1958

CIVIL PRACTICE AND PROCEDURE

PROCESS, ACCEPTANCE BY SECRETARY OF STATE FOR
NONREGISTERED FOREIGN CORPORATIONS—§§47.16 AND
47.30, CH. 613, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Should you as secretary of state accept service of process as agent for Eagle Crest Investment Corp., a Canadian corporation allegedly doing business in Fort Lauderdale, although said corporation is not registered with your office to do business in Florida under the provisions of Ch. 613, F. S.?

Section 47.16, F. S., provides in part:

Service of process upon nonresident engaging in business in state.—

(1) The acceptance by any person or persons, individually, or associated together as a copartnership or any

other form or type of association, who are residents of any other state or *country*, . . . of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in this state, or to have an office or agency in the state, *shall be deemed equivalent to an appointment by such persons and foreign corporations of the secretary of state of the state as the agent of such persons or foreign corporations upon whom may be served all lawful process in any action, suit or proceeding against them* Service of such process shall be in accordance with and in the same manner as now provided for service of process upon nonresidents under the provisions of §47.30. Provided that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute. (Emphasis supplied.)

In *State v. Register*, Fla., 67 So. 2d 619, at p. 621, the Florida supreme court said:

Consequently, we conclude that §47.16, *supra*, is constitutional in that it acts alike upon *all* nonresidents who engage in business or a business venture in this State and it is not repugnant to the privileges and immunities clause or the equal protection clause of the Federal Constitution. (Emphasis supplied.)

It would appear from the language of the supreme court quoted above that §47.16, F. S., is applicable to *all* foreign corporations alike notwithstanding the fact that some may not be registered with the secretary of state under the provisions of Ch. 613, F. S., and therefore, the secretary of state should accept service of process on *all* foreign corporations regardless whether or not they are registered to do business in Florida under the provisions of Ch. 613, F. S.

I believe the logic applied by the Florida supreme court in *State ex rel Hall v. Hildebrand*, et al., 124 Fla. 363, 168 So. 531, is applicable in the instant situation. In the *Hildebrand* case the court said that the clerk of the circuit court, in the situation then under consideration, had only ministerial duties and, therefore, no authority or responsibility to determine the validity of the acts of those filing with that office so long as the requirements of form were complied with (see also *Davis, Attorney General ex rel Taylor v. Crawford*, 95 Fla. 438, 116 So. 41). Out of an abundance of caution it would appear proper for you to accept the service of process in question as a ministerial function of your office and let the party litigants inquire of the courts as to whether or not said process is valid.

Based upon the statutes and case law cited above, it is my conclusion that your question as set out above should be answered in the affirmative.

058-182—June 12, 1958

MOTOR VEHICLES

MOTOR VEHICLE COMMISSION—LISTS AND SEARCHES,
FEES—CONSTRUCTION OF §319.25, F. S.

To: Charles Knott, Attorney, Motor Vehicle Commission, Tallahassee

QUESTION:

May the motor vehicle commissioner furnish services other than those contemplated by paragraphs (a) and (b) of subsection (5) of §319.25, F. S., and require reasonable charges in payment thereof?

Where applicable, §319.25, F. S., reads as follows:

Rules and regulations; forms; cancellation of certificates, lists and searches, fees.—

(1) The commissioner may adopt such reasonable rules and regulations as he may deem necessary to insure uniform and orderly operation of this law. The commissioner shall provide and furnish the forms required by this law.

(4) The commissioner is authorized, upon application of any person and *payment of the proper fees*, to prepare and furnish lists containing title information in such form and subject to such territorial division and/or other classification as the commissioner may authorize; to search the records of the bureau and make reports thereof, and to make photographic copies of the bureau records and attestations thereof.

(5) Fees therefor shall be charged and collected as follows:

(a) For lists of title for the entire state, or any part or parts thereof, divided according to counties, a sum computed at the rate of not over five cents per item.

(b) For photographic copies of records and attestations thereof, under the signature and seal of the commissioner, fifty cents a copy. Such copy or copies shall be taken as prima facie evidence of the fact therein stated, in any court of the state. Any individual, firm or corporation may obtain without charge oral or written reports concerning up to and including five titles in any one day and up to and including fifty titles in any one month. The commissioner shall furnish without charge to state highway patrol, sheriffs or chiefs of police information on any title. (Emphasis supplied.)

It is my understanding, and for the purposes of this opinion we assume to be factually true, that the commission could furnish services which do not come within those enumerated in the above quoted statute but nevertheless appear to be properly within the function of the department, if the actual cost incurred in the expense attendant thereto could be borne, in part, by the person requesting the service, as is the case for the services outlined in paragraphs (a) and (b) above quoted.

In our opinion, the specific authority enumerated in the above statute to furnish the enumerated services for the determined fees implies the additional authority to furnish other services

than those enumerated, but nevertheless within the function of the department, and would imply authority to require reasonable charges in payment thereof on the basis of, among other things, the additional expense incurred by the department in furnishing such services.

The above opinion results from the principle applicable to administrative agencies that the powers of an administrative agency are those which are legally conferred by the statutes expressly or impliedly for the purpose of carrying out the aims for which the agency was established (see *State v. Atlantic Coast Line R. R. Co.*, 56 Fla. 617, 47 So. 969; *State ex rel Wells v. Western Union Tel. Co.*, 96 Fla. 392, 118 So. 478; *State v. Atlantic Coast Line R. R. Co.*, 56 Fla. 617, 47 So. 969).

Before furnishing such services, however, the commissioner should make a study to determine the effort required in performing each additional service and predicated upon such study establish the fee or fees to be charged therefor.

Your question is answered accordingly.

058-183—June 16, 1958

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—TEACHER PARTICIPATION IN STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM—§§122.02(1), 122.18, 230.46, 230.47 AND 238.07, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a person who is over age for teachers' retirement system and who is employed by a state junior college eligible to participate in the state and county officers and employees retirement system?

Section 122.02(1), F. S., provides that "state and county officers and employees" shall include all full-time officers or employees who receive compensation for services rendered from state or county funds or who receive compensation for employment from any agency, branch, department, institution or board of this state or any county of this state, for service rendered the state or county from funds from any source.

Section 122.18 provides that the state and county retirement system shall not apply to members of the teachers' retirement system.

Section 238.07, F. S., provides that any member of the teachers' retirement system of the state shall be retired upon attaining 70 years of age. In A. G. O. 047-210, the teachers' retirement system was not allowed to accept an application for membership from a county superintendent who was above the age of 70 years, and this would appear to apply to teachers as well. However, in A. G. O. 043-121, the rule was that a teacher who had reached her minimum service retirement age of 60 years was eligible for membership in the teachers' retirement system as a beginning teacher.

Section 230.47, F. S., provides that a junior college established or acquired under the provisions of §230.46, F. S., shall comprise a part of the county school system of the state, shall be subject to the general school laws of the state insofar as such laws are applicable, shall be under the control of the county board of the coun-

ties in which it is located and shall be directed by a president who shall be responsible through the county superintendent to the county board of the county in which the junior college is located.

An employee of the state junior college would qualify under the definition of state and county officers and employees as outlined above unless excluded from the system as being a member of the teachers' retirement system of Florida. If the employee is not eligible for the teachers' retirement system, then he could not be a member of that system, and, therefore, would not be barred from becoming a member of the state and county officers and employees retirement system if he otherwise qualified under the above definition.

From the above statutes and authorities, your question is answered in the affirmative.

058-184—June 16, 1958

TAXATION

SALE OF PROPERTY FOR DELINQUENT TAXES, PROHIBITION AGAINST SALE PRIOR TO TIME AS ADVERTISED— §§193.54 AND 193.56, F. S.

To: *Ike Anderson, Clerk of Circuit Court, Jefferson County, Monticello*

QUESTION:

May the tax collector sell tax certificates prior to the date and hour of sale as advertised in the newspaper for delinquent taxes?

Section 193.54, F. S., provides as follows:

On the day designated in the notice of sale, at twelve o'clock, noon, the tax collector shall commence the sale of those lands on which taxes have not been paid as aforesaid, and shall continue same from day to day until each parcel thereof shall be sold to pay the taxes, interest, costs and charges thereon, and in case there are no bidders each parcel shall be bid off by the tax collector for the county, and the tax collector must offer all such lands assessed.

Section 193.56, F. S., provides as follows:

The land shall be struck off to the person who will pay the tax, interest, costs and charges and will demand the lowest rate of interest for the first year, not in excess of the maximum rate allowed by law.

In A. G. O. 043-185 the duty of the tax collector was stated to be to sell a tax certificate whenever a person will pay the tax, interest, cost and charges and will be at a lower rate of interest than anyone else. If he bids no interest then he is entitled to the purchase of the tax certificate, and it will not be the duty of the tax collector to secure any other bid as the statute is specific that the tax certificate shall be struck off to the person who bids strictly in accordance therewith. This language obviously refers to a sale on the date of sale as advertised and not some time prior thereto, for the statutes specifically provide that the tax collector shall commence a sale on the date designated in the notice of sale.

A. G. O. 048-140 provides that if there are several bidders who are willing to pay this best bid, the one submitted first in point of time would be the one to be accepted.

In view of the fact that the tax collector may not accept a bid better than the one which demands no interest, it would appear that immediately upon receiving a bid of no interest, then the tax assessor should sell to the person who will pay the tax, interest, cost and charges and demand no interest for the first year immediately after the bid is received; and no further bids may be accepted.

From the above statutes and authorities, your question is answered in the negative.

058-185—June 16, 1958

TAXATION

AD VALOREM TAX EXEMPTION, LUTHERAN RETIREMENT CENTER, VOLUSIA COUNTY—§192.06, F. S.; §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

STATEMENT OF FACTS:

The Lutheran social service of the N. Y. conference of the Augustana Evangelical Lutheran church, a corporation existing under the laws of New York and licensed to do business in Florida, purchased 20 acres of land in DeLand, Volusia county, in 1954 and mortgaged said property to a building and loan association of said city in the amount of \$12,500 and is in the process of a building program and as of Jan. 1, 1958, has approximately \$65,000 in value of property which is assessable. The above owners of the property have established a Florida Lutheran retirement center on the property and are constructing two types of retirement homes on the property; one being a modern unit with modern furniture designed for single or double occupancy, and the second is a duplex cottage, five of which are already constructed and plans call for 20 more.

Plans are already in the program for a large administration building which would house the dining hall and recreational facilities, as well as administrative offices. The center is owned by the Lutheran church and its facilities are rented to any Christian more than 65 years of age, but members of the Lutheran church are given preference.

The motel apartments are rented for \$110 per month including room, board and laundry. Those who occupy the cottage units pay \$7,500 for their unit with the title remaining in the name of the center; and at the death of the occupant, the cottage reverts to the center. They also pay a maintenance charge of \$35 a month which covers light, heat and water.

QUESTION:

Is the Lutheran retirement center as referred to above exempt from the payment of ad valorem taxes?

"Two provisions of the constitution are appropriate to the question presented, i.e., Section 1, Article IX and Section 16, Article XVI. The first establishing a 'uniform and equal rate of taxation' and 'just valuation' exempts property 'exempted by law for . . . religious . . . purposes.' The second declares all corporate property taxable with certain exceptions in which is included that 'held and used exclusively for religious . . . purposes'" (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608). The expression of the legislature, on

the matter of exemption under said §1, Art. IX, declares as exempt from taxation "all houses of public worship and the lots on which they are situated, and . . . every parsonage . . . and all burying grounds" used in connection with such church and as its property (§192.06, Florida Statutes).

It is apparent that under §1, Art. IX, State Const., and said §192.06, F. S., "exemption of property for religious purposes would not obtain except as to the church building and the lot occupied by it" and the parsonage and burying grounds of the church (see *Lummus v. Miami Beach Congregational Church*, supra).

Section 16, Art. XVI, State Const., can have no application if the church in question is an unincorporated one, as it is limited to corporations. The command of §16, Art. XVI, State Const., to tax all corporate property needs no legislation to make it effective as does the exemption provision of §1, Art. IX, of the said constitution; and the same rule is applicable to the provision for tax exemption contained in said §16, Art. XVI (*Lummus v. Miami Beach Congregational Church*, supra). Although the *Lummus v. Miami Beach Congregational Church* decision may have been limited to some extent by the cases of *State v. Doss*, 150 Fla. 491, 8 So. 2d 17 and *Rogers v. Leesburg*, 157 Fla. 784, 27 So. 2d 70, we find nothing in said cases indicating an intent to overrule the said *Lummus* case.

Under said §16, Art. XVI, State Const., the utilization of the property is the criterion in determining its liability or nonliability for taxes (*State v. Doss*, 150 Fla. 491, 8 So. 2d 17; *Riverside Military Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870), this being true the question becomes one of fact and not one of law. The fact that the property in question may not be a part of the church plant would seem immaterial so long as it is "held and used exclusively for religious . . . purposes."

The fact that an alleged charitable corporation may charge for rooms is not necessarily fatal to its claim for exemption from property taxes (*Fellowship Foundation, Inc. v. Paul*, 86 So. 2d 808). A charitable institution does not lose its charitable character and its consequent exemption from taxation merely because recipients from its benefits who are able to pay are required to do so where funds so derived are devoted to charitable purposes of the institution (*Orange County v. Orlando Osteopathic Hosp., Inc.*, 66 So. 2d 285).

It is the duty of the tax assessor to ascertain from all available evidence and by personal observation whether the property claimed as exempt as being used for some charitable purpose is actually and primarily used for this purpose.

On the basis of the facts as outlined, it appears that the property is owned by a religious organization. The question for the tax assessor to determine is whether the property is held and used exclusively for religious purposes; and in coming to this conclusion, the person seeking the exemption must establish by competent proof and conclusively show that the property is within the exemption (*Dr. William Howard Hay Foundation v. Wilcox*, 24 So. 2d 237).

The above observations seem to answer the question as well as the same may be answered from the record before us.

058-186—June 16, 1958

TAXATION—CORPORATIONS

CAPITAL STOCK TAX—NONPROFIT CORPORATION FOR COOPERATIVE HOUSING PROJECT, TITLE 12, USCA 1715e—§608.33, CHS. 617 AND 619, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Is a nonprofit corporation organized under Ch. 608, F. S., exempt from payment of capital stock taxes?

Title 12 USCA 1715e authorizes governmental insured financing on cooperative housing projects. This particular method of financing is available to certain types of corporations or cooperative associations. One of the requirements of the federal agencies before whom a cooperative housing association must qualify is that the cooperative housing projects being financed be owned or sold to a nonprofit corporation or association which has issued to the federal housing administration or its designated representatives shares of preferred stock having a par value of one dollar each. The federal agency also requires that shares of common stock be issued to the individual unit owner or members of the association.

Inasmuch as the Florida Statutes relating to cooperative associations and corporations not for profit are limited in their application to associations or corporations organized for specific purposes and do not authorize stock to be issued by such associations or corporations, the cooperative association must of necessity be organized under Ch. 608, F. S., the general corporation laws, if it desires to avail itself of F.H.A. insured mortgage funds.

Section 608.33, F. S., requires that every corporation except railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative marketing associations and corporations not for profit, doing business in this state shall pay to the state for the use of the state a capital stock tax according to a designated schedule. The capital stock mentioned in the schedule refers to the invested capital represented by shares of stock outstanding.

The tax imposed by this section is a filing fee or tax upon the privilege of doing business as a corporation in the state (*Jacksonville Gas Co. v. Lee* 148 So. text 191). In 759 Riverside Avenue, Inc., v. Marvin, (147 So. 848), it is held that a corporation accepting a charter takes it cum onere and subject to conditions prescribed by law under which it is created.

Where statutes such as §608.33, F. S., impose on corporations an excise or privilege tax, often referred to as a franchise tax for the privilege of existing or doing business, the tax is not to be computed on the basis of the value of the corporation's franchise or privilege considered as property or assets, but on such basis or by such method as may be arbitrarily specified by the statute (84 C. J. S., Taxation, §453).

In *State v. DeKalb County Exchange, Inc.* (43 So. 2d 809, Ala. 1950) capital stock was defined as the amount subscribed and paid in by shareholders or secured to be paid in, and upon which a corporation is to conduct its operations.

This particular type of corporation or cooperative association, although in fact an association of nonprofit type, must of necessity

be organized under Florida general corporation laws, Ch. 608, F. S., as its purpose does not come within the classification of purposes for which corporations not for profit or cooperative associations may be organized under Ch. 617 or 619, F. S.

It is a fundamental rule of statutory construction that statutes dealing with the same subject matter are to be considered *pari materia*. Thus, the exemption provided for corporations not for profit as appears in §608.33, F. S., must be considered as applying to those corporations organized in accordance with Ch. 617, F. S.

It is my opinion that the particular type of corporation herein considered does not come within the exemptions provided by §608.33, F. S., and therefore is liable for the payment of corporation stock or filing fees.

The question propounded is answered in the negative.

058-187—June 16, 1958

CITIES AND TOWNS

MUNICIPAL TORT LIABILITY, OPERATION OF A YOUTH EMPLOYMENT PROGRAM—§§450.121, 449.02, 443.11, 443.13, 449.01(1) AND 440.02(8), F. S.

To: *Burnis T. Coleman, Florida Industrial Commission, Tallahassee*
QUESTION:

What is the extent of the legal liability of a municipality in its operation of a youth employment service as a part of its summer recreation program?

I assume your interest in the above question stems from the fact that the industrial commission is charged with the responsibility of administering the laws relating to child labor (§450.121, F. S.), private employment agencies (§449.02, F. S.), employment service (§§443.11, 443.13, F. S.), and workmen's compensation (§440.02(8), F. S.).

At the outset, it should also be stated that this opinion assumes and does not indulge the question that the operation of such a project as contemplated in the above question, as an integral part of a municipally operated and sponsored summer recreational program, is properly within the authority of the municipality and is not *ultra vires*. The question for determination herein is the extent of the legal liability of a municipality in its operation of a youth employment service as a part of its municipally operated and sponsored summer recreational program, wherein the minor would perform such services as baby-sitting, lawn care, etc.

The fact that it is municipally operated will not remove the employment of the minors from the restrictions imposed by the child labor law. However, the requirements of the law relating to the licensing and regulation of private employment agencies is not applicable to the municipality inasmuch as such program is of a public nature and is not conducted for the purpose of "for hire or for profit" as contemplated by §449.01(1), F. S.

As to the applicability of the youth employment program to the workmen's compensation law, we do not believe a municipality acting in this regard and in a limited sense as an employment agency would be liable for workmen's compensation coverage any more than a private employment agency would be liable to its clients for such coverage inasmuch as there is an absence of a master-servant relationship between the municipality and the minor (*Gentile Co. v.*

Florida Industrial Commission, 10 So. 2d 568. See also *Op. Atty. Gen.* 058-152). Further, we do not believe the part-time and temporary employers of such minors would be liable for such coverage, for, among other reasons, the exemption from workmen's compensation of casual employment provided by §440.02(3), F. S., and the three-employee requirement of §440.02(1), F. S.

The foregoing considerations relating to the application of the question to the indicated statutory provisions are susceptible to an opinion giving a more or less affirmative or negative conclusion. However, perhaps the more important consideration inherent in the above question, namely the tort liability aspect, is in our opinion not responsive to a determined conclusion.

Generally speaking, and for the purpose of this discussion, the determination of tort liability of a municipality is usually predicated upon whether the activities engaged in by the municipality could be classified as a proprietary or governmental function. Usually, if the latter is designated, liability does not exist. Perhaps the most succinct statement of this concept of municipal immunity from tort liability was made by Professor Charles W. Tooke in his treatment of the subject, in 19 Va. L. Rev. 97, in the following language:

The doctrine is that a municipal corporation is not liable to respondent damages for the negligence of its officers, agents or employees when they are acting in discharge of public or governmental functions. . . . On the other hand, the municipality will be held liable for the negligent acts of its officers and agents acting within the scope of their authority, when they are performing functions that are classified as corporate or proprietary.

Obviously, this method of classification enables the courts to predicate liability on a municipality for the negligent act of its servants by designating the function proprietary. It provides inroads on the legal fiction of municipal immunity from tort liability which have the support of legal critics who view the concept of the extension of sovereign immunity to a quasi public body as "having occurred in the philosophy of one day and without serious judicial or legislative re-examination allowed to continue in that of another" (see 9 Law and Contemp. Prob. 216). As the learned Justice Thornal indicated in the recent case of *Hargrove v. Town of Cocoa Beach*, 96 So. 2d. 130, the concept is a judicial and not a legislative determination having been conceived, or born, in the English case of *Russell v. Men of Devon*, decided in 1788. Our learned jurist was of the view that if the concept is to be abolished it would be proper for its death to result in the manner of its birth, i.e., through judicial and not legislative process. Joining the legal scholars who have distinguished *Russell v. Men of Devon* and have indicated the inapplicability of the concept to present day activity, Justice Thornal went on to state:

The problem in Florida has become more confusing because of an effort to prune and pare the rule of immunity rather than uproot it bodily and lay it aside as we should any other archaic and outmoded concept.

The *Hargrove* case is perhaps the greatest step taken by our judiciary toward the abolishment of the concept and toward subjecting municipalities to the same liability as private corporations. It is mentioned herein in an effort to predict the efficacy of any defense predicated upon municipal immunity from tort liability.

However, inasmuch as the concept to some degree continues to exist, and moving from the general to the specific, we hasten to indicate that the decisions of other than Florida courts are in conflict upon the question of whether the maintenance of playgrounds and recreational centers by municipalities is a proprietary or governmental function. Some courts have held that the maintenance of such facilities by municipalities is a proprietary function, and therefore the municipality must exercise reasonable care to protect patrons from the negligence of its employees. Failure to do so creates municipal liability in the event of an injury to a participant in the recreation program (see *McQuillin on Municipal Corporations*, 3rd Ed., §53.114). In cases involving parks, swimming pools and recreation centers, there has been a decided tendency to constrict the area of municipal immunity (44 W. Va., L. Q. 159; 34 Mich. L. Rev. 1250; 14 N. C. L. Rev. 388; 19 St. Louis L. Rev. 257; 3 Cinn. L. Rev. 183). Occasionally a court will make the blanket expression that municipal property must be managed with the same care and liabilities as are attendant to privately owned property (22 Marq. L. Rev. 158). There is unquestionably the growing tendency to impose responsibility for the careful operation and maintenance of parks and recreational facilities. For "to hold otherwise is to establish a rule of law which puts children at the mercy of dangerous conditions of which they are not aware and over which they have no control" (see 19 St. Louis L. Rev. 257).

"While a sharp division exists," said Justice Sebring in *Lisk v. City of West Palm Beach*, 160 Fla. 32, 36 So. 2d 197, "in the authorities upon the question of the tort liability of a municipality for injuries growing out of alleged defects in free parks or facilities maintained for the use of the public, we are committed in this jurisdiction to the rule that 'where a city, pursuant to charter power, performs a local function for its people it is held to the same degree of care as private persons.'" Admittedly, if a minor were injured as a result of the employment obtained under the program contemplated in the above question, it would not be as a result of a physical defect in the recreational facilities. Is it not conceivable, however, that any negligence of a municipal employee, for instance, in not ascertaining the nature and condition of the employment when directing the minor to such employment, could be imputed to the municipality?

Unlike other recreational programs, the participant minor, while engaged in an employment resulting from the above contemplated operation, is beyond the supervision and guidance of the municipal recreation directors. Inasmuch as there is an absence of clear legal authority or precedent, we are not inclined to express an opinion to the effect that if a municipality engaged in such an enterprise or project it would not be legally responsible for any injury or harm resulting to a juvenile participant upon a showing that the responsible municipal employee did not exercise proper diligence in the determination of safety hazards involved when directing the minor to, and in, the employment obtained through participation in the program.

Your question is answered accordingly.

058-188—June 17, 1958

CITIES AND TOWNS

POLICEMEN'S RETIREMENT FUND—CONSTRUCTION OF
§§185.19 AND 185.20, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

What is the effect of §185.20, F. S., which states that police officers retirement benefits shall be conditioned upon continuous employment in one municipality during the period immediately prior to retirement, upon §185.19, F. S., which permits a police officer who has served 10 years or more to leave the police force before retirement age, but to receive retirement compensation when he reaches age 60?

Section 185.19, F. S., clearly sets out the conditions under which a police officer who has served 10 years or more in the service of one municipality may leave said service and upon electing not to withdraw his contributions to the retirement fund, receive retirement compensation at age 60.

Section 185.20, F. S., provides:

Retirement benefits, limitation.—Police officers' retirement benefit shall be conditioned upon continuous employment or service within any one municipality during the period immediately prior to his retirement.

Chapter 185, F. S., was first passed in 1953. Section 185.19, F. S., has not been amended since that time. In 1955 §185.20, F. S., was amended to read as quoted above. Originally §185.20 provided that a policeman whose service with a municipality was severed could leave his contributions in the fund pending possible reemployment and if reemployed, add the previous years of service in computing his period of service for retirement. The title to the 1955 amendment of §185.20, F. S., reads: "... amending §185.20, Florida Statutes, to provide that retirement benefits only to accrue for continuous service"

It is my opinion that while amended §185.20, F. S., does require continuous service in one municipality in computing the "period" of service for retirement, it does not destroy the right of a policeman who has been continuously employed in one municipality for ten years or more, upon leaving the service prior to retirement age, to receive retirement compensation when he reaches age 60.

058-189—June 18, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY COMMISSIONERS, COMPENSATION—§125.161(1),
(2), (4), F. S., LAFAYETTE COUNTY

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

1. Is §125.161(1), as appears in Florida Statutes, 1955 preserved by §125.161(4), F. S., 1957?

2. Is the compensation of the members of the board of county commissioners of Lafayette county governed by Ch. 57-798, §125.161(1) or by Ch. 30196, 1955?

Effective July 1, 1957, subsections (1), (2) and (4) of §125.161,

F. S., 1955, were amended by Ch. 57-798. The questions presented require construction of the particular language of subsection (4) of this statute as amended. Certain fundamental rules of statutory construction, as hereinafter set out, are controlling.

The Supreme Court, in construing statute, will consider its history, evil to be corrected, law making body's intentions, subject regulated, and object to be obtained.—*Scarborough v. Newsome*, 7 So. 2d 321, 150 Fla. 220.

In construing a statute, courts will consider the language of the statute, the subject regulated, the purpose designed to be accomplished, and the means adopted in the accomplishment of the purpose.—*Ervin v. Peninsular Tel. Co.*, 53 So. 2d 647.

Purpose and intent of legislative act should be construed so as to fairly and liberally accomplish beneficial purpose for which it was adopted and all intendments favored towards its validity rather than apply a rule of strictness which defeats and makes meaningless fundamentals of Legislative power.—*Hanson v. State*, 56 So. 2d 129.

A statute should be so construed and applied as to give effect to the evident legislative intent, even if result seems contradictory to rules of construction and the strict letter of the statute.—*Beebe v. Richardson*, 23 So. 2d 718, 156 Fla. 559.

In statutory construction, legislative intent is the pole star by which the court must be guided, and such intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction.—*Smith v. Ryan*, 39 So. 2d 281.

Section 125.161(1), F. S., 1955, was a general law providing the annual compensation for members of the respective boards of county commissioners of the several counties. Chapter 57-798, laws of Florida, amends said section into its present form, as now appears in §125.161(1) *Florida Statutes*, 1957.

Section 125.161(4), *Florida Statutes*, 1957, presents the following language—"This section shall not be construed to . . . repeal or modify the provisions of any law relating to the compensation of county commissioners passed by the 1955 or 1957 sessions of the Florida Legislature."—which if given literal application to §125.161(1), *Florida Statutes*, 1957 results in the preservation of §125.161(1), F. S., 1955. Certainly the legislature did not intend an amending act to, in effect, repeal itself by preserving the amended statute.

The legislature has seen fit for various reasons to enact general laws of limited application (population acts) as well as special and local laws providing the compensation of boards of county commissioners. Numerous enactments of this type were made during the 1955 and 1957 legislative sessions.

It is my opinion upon consideration of §125.161(4), F. S., 1957, in the light of the above rules of statutory construction that the legislature intended the general laws of limited application, and local or special acts pertaining to the compensation of the members of the boards of county commissioners of the several counties, be unaffected by the enactment of Ch. 57-798, Laws of Florida (§125.161(1), F. S., 1957)

Question 1 is answered in the negative.

Having answered question 1 in the negative, it is my opinion that the compensation of the members of the board of county commissioners of Lafayette county is to be governed by the provisions of the local law (Ch. 30196, 1955) until such time as said chapter is repealed or amended by the legislature.

058-191—June 20, 1958

INSURANCE

LIFE INSURANCE AGENTS—COMMISSION-SPLITTING— §§634.17(2) AND 627.89(2), F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*
QUESTION:

May an individual, who does not hold a currently valid life insurance agent's license, act as general agent for a life insurance company and receive commissions on policies issued by licensed agents whom the general agent has appointed for the company?

I am informed that the situation which necessitated the request for this opinion was as follows: A person who no longer holds a life insurance agent's license in this state, has a large number of contacts and a wide knowledge of the life insurance market in a certain area in this state. Said person desires, under agreement with a life insurance company, to appoint several individuals who are licensed in this state as life insurance agents, said person to supervise the agents' operations and to share in their commissions.

Section 634.17(2), F. S., provides:

No life insurer or licensed life insurance agent doing business in this state shall pay directly or indirectly any commission or other valuable consideration to any person for services as a life insurance agent within this state, unless such person shall hold a currently valid license to act as a life insurance agent as required by the laws of this state; nor shall any person, other than a duly licensed life insurance agent, accept any such commission or other valuable consideration; provided, however, that the provisions of this section shall not prevent the payment or receipt of renewal or other deferred commissions or pensions to or by any person solely because such person has ceased to hold a license to act as a life insurance agent.

Although said subsection does not speak specifically in terms of commission-splitting I am of the opinion that such is included within the intent of said subsection. The comparable provision of Ch. 627, F. S., which regulates fire, casualty and surety agents, is §627.89(2), F. S. Said subsection provides:

No licensee shall divide with others or share in any commissions payable on account of insurance subject to this law except as follows:

(a) A resident agent may divide or share in commissions with his own employed solicitors, and with other resident agents licensed to write the same kind or kinds of insurance.

(b) A resident agent and a nonresident agent, subject to provisions of §627.85(2), may divide among themselves commissions as to kinds of insurance for which both are licensed.

By comparison, Ch. 634, F. S., pertaining to life insurance agents, is more strict on this subject than Ch. 627, F. S., as the first exception to commission-splitting by fire, casualty and surety agents, as set forth above, is clearly prohibited to life insurance agents.

It is my opinion that §634.17(2), F. S., prohibits the division of commissions by a life insurance agent with any person who does not hold a currently valid license to act as life insurance agent in this state. Your question is answered in the negative.

058-193—June 20, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY HEALTH UNITS—AUTHORITY TO PURCHASE
BULLDOZER—CONSTRUCTION OF §§154.01 AND 154.02, F. S.**

To: *Harry G. Smith, Budget Director, Tallahassee*

QUESTION:

May funds be withdrawn from a county health unit fund in the state treasury for the purpose of purchasing a bulldozer for use in a sanitary land-fill operation conducted under the responsibility of a county health department?

Section 154.02, F. S., which authorizes the levy of a tax for the creation of the funds of the several county health units in the state treasury, provides that "such funds shall be expended by the state board of health *solely* for the purpose of carrying out the intent and object of this chapter in such county. (Emphasis supplied.)

The "intent and object" of Ch. 154, F. S., referred to above, is reflected in §154.01, which provides that the several counties may cooperate with the state board of health in the establishment and maintenance of local health units "for the control and eradication of preventable diseases, and inculcate modern scientific methods of hygiene, sanitation and the prevention of communicable diseases." If there is authority for a county health unit to engage in, and maintain, a garbage disposal project, its existence must be attributable to the foregoing language.

The powers of an administrative agency are limited, being only those which are legally conferred upon it by statute expressly or impliedly for the purpose of carrying out the aims for which it was established (see 1 Fla. Jur., Administrative Law, §21). Inasmuch as express authority is lacking for the purchase of a bulldozer by a county health unit, authority for the purchase must necessarily be implied from the general authority granted. It must be indispensable to the fulfillment of the legislative intent. If the funds which were realized from a specific tax levy for the purposes indicated by §154.01, *supra*, are to be employed for the purchase contemplated in the above question, the use of such funds must not merely assist, but must be indispensable to the fulfillment of the legislative intent contained therein.

For some considerable time specific authority has existed in the statutes for municipalities to provide for the disposal of garbage, and to acquire property of a private company for such purpose (§§180.06 and 180.16, F. S.). Counties have similar specific authority. In 1955 the legislature provided general authority for the county commissioners to expend *county funds* for the operation of garbage dumps (see §125.311, F. S.). On July 17, 1953, this office rendered opinion 053-151 to the Hon. T. W. Conoley, county attorney, Okeechobee county, wherein we held, among other things, that the county commissioners had the implied authority under the provisions of Ch. 27249, 1951, to purchase a bulldozer in cooperation with the city of Okeechobee to be used for the disposal of garbage by the sanitary land-fill or trench method. We were of the opinion that such authority was implied inasmuch as a bulldozer was indispensable to the fulfillment of the legislative intent that the city and county jointly operate a "garbage plant."

Although the moneys making up the county health unit funds in the state treasury were originally obtained from the counties, such funds are not county funds in the sense that they may be employed for any general county purpose, being restricted to the purposes contemplated by §154.01, *supra*.

In light of the foregoing specific legislative authority for the county commissioners and municipalities to operate a sanitary land-fill operation, it is difficult to envision implied duplicative authority for the county health unit to perform the same function. Particularly is it difficult when it is apparent that such authority is not indispensable to the fulfillment of the legislative intent contained in Ch. 154 relating to the "control and eradication of preventable diseases, and inculcate modern scientific methods of hygiene, sanitation and the prevention of communicable diseases."

The authority both legally and traditionally for the operation and maintenance of garbage disposal dumps or plants is vested in the counties and municipalities and is not a proper function of local health units. The role of the health unit in relation to the subject of garbage disposal is in the enforcement of the regulations promulgated by the state board of health under §381.03, F. S., which requires such board, among other things, to adopt and promulgate rules and regulations consistent with law regulating "the disposal of garbage and refuse," and the intent reflected in §154.01, *supra*, to "inculcate modern scientific methods of . . . sanitation. . . ."

According to Webster's new collegiate dictionary the word "inculcate" means: "To teach and impress by frequent repetitions or admonitions, to urge on the mind." If public health specialists and authorities are of the opinion that the sanitary land-fill, or trench method, is the most desirable method of garbage disposal, their duty is to urge such method upon those charged with the responsibility of such function.

In light of the foregoing, it is our opinion that your question should be answered in the negative.

058-194—June 20, 1958

COURTS

JUVENILE COURT JUDGE—TRIAL JURISDICTION OVER
ADULT—CONSTRUCTION OF §232.19, F. S.*To: Thomas J. Rivers, Judge of Juvenile Court, Clay County, Green
Cove Springs*

QUESTION:

In a case made against an adult parent for the failure or refusal of such parent to have a child attend school regularly, is the juvenile court judge authorized to try such parent without a jury?

Section 232.19, F. S., relating to the court procedure and penalties in the enforcement of the compulsory school attendance law, provides that the juvenile court shall have "original and exclusive jurisdiction of all proceedings or prosecutions under the provisions of this chapter for enforcing compulsory school attendance laws." The same section provides: "The parent who refuses or fails to have a child under his control to attend school regularly shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars or sentenced to imprisonment in the county jail for not more than ninety days. . . ."

Chapter 39, F. S., the general law establishing juvenile courts and the procedure thereof in Florida, does not provide machinery for jury trials, nor does it contemplate the need therefor.

Applicable to the above question is the following statement contained in 31 Am. Jur., Juvenile Courts, §93:

The general rule is that proceedings in the juvenile court against adults for contributing to the delinquency or neglect of children are to be taken as criminal in their nature and consequently the ordinary rules of criminal procedure must be observed. In some states, where the legislature has attempted to provide that the prosecution of such charges shall be had before the juvenile courts without a jury and without the general protection which must be afforded in criminal trials, the laws have been declared invalid, since they impair the constitutional rights of the accused.

The Florida constitution provides, in §11, of the Declaration of Rights, that in all criminal prosecutions the accused shall have the right to a trial by an impartial jury. Also contained in §7, Art. V thereof, is the provision that county judges courts shall have original jurisdiction of such criminal cases as the legislature may prescribe. The foregoing is qualified by §8, Art. V which provides that the legislature may organize, in such counties as it may think proper, county courts which shall have jurisdiction, among other things, of misdemeanors.

Pursuant to the foregoing authority and direction, the legislature provided, in §932.01(4), F. S., original jurisdiction in criminal cases, in the circuit courts, criminal courts of record, county courts, county judges courts and courts of justices of the peace. Section 34.01(4), F. S., vests the county court with jurisdiction of all misdemeanors excepting counties where there are criminal courts of record. The county judge, under §36.01,

F. S., is vested with original jurisdiction in counties where there are no county courts or criminal courts of record to try and determine all misdemeanors committed in his county.

Inasmuch as the constitution provides that original jurisdiction in misdemeanor cases shall vest in county courts and county judges courts when established by the legislature, it is apparent that §232.19, supra, could not properly vest such original jurisdiction in the juvenile court.

When reading the provisions of §232.19, F. S., in light of the rule of statutory construction that whenever possible a statute should be construed in an effort to uphold its constitutionality to assure the remedy afforded thereby, it is our opinion that such section should be construed as providing original jurisdiction in the juvenile court only as to the juvenile, and that, as to the adult parent, the juvenile judge sitting as a committing magistrate under the authority of §39.02(4), F. S., should follow the procedure outlined in §902.01, F. S., for magistrates not empowered to determine and try the case. This, of course, is the same suggestion offered in the answer to question 2 in opinion 058-145, rendered by my office on April 23, 1958.

As the court, in *Ex parte Kitts*, 147 So. 573, indicated on p. 575 thereof:

Juvenile courts and judges have no criminal jurisdiction, nor have they any jurisdiction to try and adjudge any person, whether a minor or not, guilty of the violation of a city or town ordinance. *Adjudications of guilt* of violation of state laws or city or town ordinances must therefore be made by those courts having jurisdiction to make an adjudication of that kind, after which sentence on the adjudication of guilt may be imposed, or the child may be remanded to the juvenile authorities for proceedings looking to his commitment as a "delinquent child." (Emphasis supplied by the court.)

The limitations of the juvenile court, because of its specialized nature, is recognized in the constitution, in §12, Art. V, thereof, which provides that such court, in exercising its jurisdiction over minors, shall not be limited by the provisions of the constitution as to trial by jury.

In light of the foregoing considerations and applicable provisions of law, your question is answered in the negative.

058-195—June 20, 1958

CRIMINAL PROCEDURE

INSTRUCTIONS TO A CORONER'S JURY—INQUEST OF THE DEATH OF UNKNOWN PERSON BY UNKNOWN MEANS, BY UNKNOWN PERSON—CH. 936, F. S.

To: *Robert J. Pauley, Judge, Justice of the Peace Court, St. Petersburg*

QUESTION:

What is the proper form of instructions to be given to a coroner's jury at an inquest of the death of an unknown person by unknown means and at the hands of unknown persons?

After studying the various provisions of Ch. 936, F. S., re-

lating to inquests, I have reached the opinion that instructions in the form hereinafter set forth may appropriately be given to a coroner's jury at an inquest of the death of an unknown man by unknown means and at the hands of unknown persons, and that with slight changes said instructions may be used if the unknown deceased is a woman or a boy or a girl, to-wit:

INSTRUCTIONS

Gentlemen of the jury, you have been summoned to inquire into the death of a man whose identity is not known to me.

I charge you upon your oaths to make all inquiry within your power as to the name of the deceased and as to how and in what manner and by whom he came to his death; whether he died of felony, mischance or accident; if of felony, who were the principals and who were the accessories, with what instrument he was struck or wounded, and so of all prevailing circumstances which may come by presumption; if by mischance or accident, whether by the act of man or whether by hurt, fall, stroke, drowning or otherwise; and to inquire of the persons who, if any, were present, and of any friends, relatives and neighbors of the deceased who may be discovered by your inquiry, whether he was killed in the same place where the body was found; and if elsewhere, by whom the body was brought thence, and of all other circumstances relating to said death; and if he died of his own felony, then to inquire of the manner, means or instrument, and of all other circumstances concerning such death.

I further charge you upon your oaths that, having viewed the dead body and having heard the evidence and having made all inquiry within your power as to the matters and things which I have instructed you to inquire into, you will draw up and deliver to me your written verdict upon the death under consideration, which verdict shall be signed and sealed by each of you and shall declare your findings as to the matters and things concerning which you have been instructed to inquire.

I also charge you to make a separate report, which shall be returned with your verdict, and which shall be signed and sealed by each of you, in which report you will give a minute and particular description of said deceased person, together with his name if it can be ascertained, and the amount of money, property or other valuables found with his body.

058-196—June 20, 1958

CRIMINAL PROCEDURE

WAIVER OF PRELIMINARY EXAMINATION—§902.01, F. S.

To: *Mahlon C. McCall, County Judge, Milton*

QUESTION:

What action or lack of action on the part of the accused is considered as a waiver of a preliminary examination?

Your letter states that it is your understanding that a preliminary hearing must be held for one charged with a criminal offense in every case in which the defendant does not waive preliminary hearing. I assume that this statement has reference to cases which the magistrate is not empowered to try and determine, since those are the only cases in which a county judge

or other magistrate is required to conduct preliminary hearings (see §902.01, F. S.).

I do not find that our supreme court has made any ruling on the question of what constitutes a waiver of a preliminary examination. It has been my observation that a defendant who desires to waive a preliminary hearing ordinarily appears before the magistrate and announces that he does not want a preliminary hearing, and I think that when a defendant does this voluntarily and advisedly a legal waiver is effected. The rulings of courts in various other states are reflected in the following quotation from 14 Am. Jur. 935-936, Criminal Law, §242:

The right to a preliminary examination to the extent that it is for the benefit of the accused is a personal privilege which he may waive unless prohibited by law. He may manifest a waiver either expressly or by implication. Voluntarily stating to the magistrate, before examination, that he is guilty is an express waiver of the right. He may waive his privilege by failing to claim it at the proper time. If he desires to claim his privilege, he should do so certainly before a verdict of guilty, and perhaps before the jury to try the cause are selected, impaneled, and sworn. It is generally held that a person accused of a crime waives his right to a preliminary examination by pleading to the merits and going to trial without making objection to the want of a preliminary examination or by voluntarily giving a bond or personal recognizance for his appearance at a future term of court, without demanding a preliminary examination. It is too late for the accused, after verdict and judgment against him, to claim his right for the first time in the appellate court and to demand a reversal of the judgment on the ground that he had not been given the privilege and had not waived it.

If a person charged with a crime is under recognizance to appear at a preliminary examination, but fails to appear in person, the view has been taken that he waives his right to a preliminary examination, and his attorney who appears for him may not insist on the examination being held in his absence.

and in the following quotation from 22 C. J. S. 488, Criminal Law, §333-a:

A waiver of a preliminary examination may be made either expressly or by implication; and it may be made by accused, without personally appearing, through a co-defendant thereto authorized. A waiver of a preliminary examination will be implied from the fact that accused, against whom no written complaint was filed, gave bail to answer at the next term of court; or that he stipulated to appear on a future day and was then released on parole; or that he voluntarily appeared and asked to be admitted to bail; or that he failed to appear in person at the time and place set for the preliminary examination; or that, on being arraigned before the examining magistrate, he voluntarily pleaded guilty and was committed; or pleaded not guilty and submitted to be bound over without an examination; or that he failed to raise objection

to the lack of a preliminary hearing before he entered his plea of not guilty, or to the merits, whereupon the trial was proceeded with.

It is, of course, possible that our appellate courts would not follow all that is said in the above quoted matter. If you should wish my opinion about whether a waiver has been effected in a particular situation, please inform me of all of the pertinent facts involved so that I may consider them in arriving at a conclusion.

058-197—June 25, 1958

PUBLIC LANDS AND PROPERTY

BULKHEAD LINE—BOCA CIEGA BAY—§§253.122-253.0013,
F. S. AND CH. 31182, 1955

To: *Harry R. Chadwick, Jr., Chief Deputy Clerk, Circuit Court,
Pinellas County, Clearwater*

QUESTIONS:

1. May the Pinellas county water and navigation control authority refer an application for the fixing of a bulkhead line to an examiner for his findings and recommendations?

2. May the Pinellas county water and navigation control authority combine proceedings for the issuance of a dredge and fill permit and fixing of a bulkhead line so that both matters are heard at a single hearing before the examiner?

3. Would this combined proceeding be proper if the hearing was before the water and navigation control authority, assuming question 1 is answered in the negative?

4. If the answers to the above questions are in the negative, may the clerk (a) properly advertise such a proceeding or (b) issue a dredge and fill permit based upon such procedure?

In answering your questions I have reviewed Ch. 57-362, and Ch. 31182, 1955. I assume the application is for a fill permit by the owner of the upland covering only those submerged lands immediately adjacent to his upland. I also assume the hearing is properly advertised for the required period of time. Based upon these assumptions I proceed to answer your specific questions.

AS TO QUESTION 1:

The special act, Ch. 31182, 1955, under which the Pinellas county water and navigation authority issues dredge and fill permits specifically provides for an examiner so far as such permits are concerned (see §9). Whether or not the authority refers such matters to an examiner is discretionary. Chapter 57-362, under which the Pinellas county water and navigation control authority derives its bulkhead powers, does not specifically provide for examiners. However, I do not feel this lack of a specific provision excludes the use of examiners in bulkhead matters. The mere fact that the legislature does not provide for examiners does not preclude their use in public hearings so long as the body upon whom the ultimate decision rests, makes the decision. In this respect it is stated in American Jurisprudence:

Due process of law does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. A hearing is not inadequate or unlawful merely because the taking of testimony is delegated to less than the whole number, or even to a single member, of the administrative tribunal, or to an examiner, hearer, or investigator employed for this purpose, even though such procedure has not been expressly authorized by the legislature. The actual decision must remain with and be made by the body constituted by the legislature, but it may be made on the report of the examining officer or body. . . ." (42 Am. Jur., Pub. Adm. Law, 141, p. 484).

So long as the authority makes the decision, based upon the facts gathered from the hearing before the examiner, I do not feel it is improper to refer bulkhead matters to an examiner.

Question 1 is answered in the affirmative.

AS TO QUESTION 2:

Section 2, Ch. 57-362, authorizes the board of county commissioners or the governing body of a municipality to fix bulkhead lines. Section 8 of the act transfers this authority to any special agency of the county created for this purpose. The Pinellas county water and navigation authority received its bulkhead authority under this section. The bulkhead act, Ch. 57-362, provides that no person shall construct islands or add to existing lands or islands until a bulkhead line is set. A bulkhead line and a dredge and fill permit both require public hearings, but I find no provision in the act which precludes one hearing for both fixing the bulkhead line and issuing a fill permit pursuant thereto. When one hearing can accomplish both purposes without prejudicing the public's rights and interested parties are properly notified, I see no objection to such procedure.

Question 2 is answered in the affirmative.

AS TO QUESTION 3:

Since question 1 is answered in the affirmative, it is not necessary to answer this question.

AS TO QUESTION 4:

Since questions 1 and 2 are answered in the affirmative, it is not necessary to answer this question.

058-198—June 26, 1958

**AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY
CITRUS COMMISSION—LIMITATION OF \$100,000, SALARIES
AND HEADQUARTERS—§601.10(3), F. S.**

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Does the limitation of \$100,000 contained in §601.10 (3), F. S. apply solely and exclusively to the amounts of the salaries of the manager, attorney and attorneys and other persons employed in the headquarters of the Florida citrus commission to the exclusion of any salaries and expenses of the field department and the statistical department and other necessary expenses of the com-

mission, overhead or otherwise, notwithstanding the use of the words "entire overhead expenses" contained in said subsection?

Section 8(3) of Ch. 16854, 1935, is in part as follows:

... that the entire overhead expenses of the said commission shall not exceed \$30,000.00 per annum including the salary of the manager and attorneys and other persons employed in the headquarters of the commission, provided that this limitation shall not apply to field employees or agents of the commission.

This section has been changed and now as §601.10(3), F. S., is as follows:

... that the entire overhead expenses of the said commission of the salaries of the manager, attorney and attorneys and other persons employed in the headquarters of the commission in its actual administrative departments shall not exceed one hundred thousand dollars per annum and provided further that this limitation shall not apply to or include the expenses and salaries of the field department, statistical department or the employees therein or other necessary expenses of the commission

The changing of the wording of the act from "the entire overhead expenses of the said commission shall not exceed . . . including the salaries of the manager and attorneys and other persons employed in the headquarters . . ." to read as follows: "... the entire overhead expenses of the said commission of the salaries of the manager, attorney and attorneys and other persons employed in the headquarters of the commission . . ." shows a clear indication on the part of the legislature to confine the effect of the statute exclusively to the manager, attorney and attorneys and other persons employed in the headquarters of the Florida citrus commission.

For these reasons your question is answered in the affirmative.

058-199—June 26, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
TAX ASSESSMENTS—PROPERTY APPRAISALS—EMPLOY-
MENT OF APPRAISERS—§193.111(1), F. S.—PASCO COUNTY**

To: *Kenneth Barnes, Attorney, Board of County Commissioners,
Dade City*

QUESTION:

May the board of county commissioners employ a professional property appraisal company, as well as appoint a board of independent appraisers, comprised of professional or lay appraisers, to make an appraisal of all property in the county?

The board of county commissioners is authorized to secure an appraisal of the property in the county by "a company or board of appraisers to be selected by the board of county commissioners" (§193.111(1), F. S.).

In A. G. O. 057-3 it is noted that said section treats county-wide appraisals thereunder, as a county project and not one of the assessor of taxes. Although the original of the appraisement

is required to be filed in the office of county assessor of taxes, we find nothing in the statute which requires the assessor of taxes to use or be bound by the said appraisal. The language of this statute is in the disjunctive and, in the elementary sense, the word "or" indicates alternative and often connects a series of words or propositions presenting a choice of either (Pompano Horse Club v. State 111 So. 801, 93 Fla. 415, 52 A. L. R. 51).

Where, as in this statute, the word "or" is employed between two terms describing different subjects of power, it usually implies discretion if it occurs in directory provisions and a choice between two alternatives if it occurs in a permissive provision (Pompano Horse Club v. State, 111 So. 801, 93 Fla. 415, 52 A. L. R. 51).

Unquestionably, the employment of either an appraisal company or the appointment of persons to comprise a board of appraisers is, under this section, a valid county purpose and county funds may be used to pay for the service rendered.

Inasmuch as the language of this statute is permissive and in the disjunctive, it is my opinion that it contemplates the use of one of the methods authorized rather than the use of both methods simultaneously. The use of both a professional appraisal company and an appraisal board, appears to be an unnecessary expenditure of public funds.

The question propounded is answered in the negative.

058-200—June 26, 1958

CORPORATIONS AND BUSINESS TRUSTS

AUTHORITY OF AGENCY OF SISTER STATE TO REGISTER BUSINESS IN FLORIDA—CHAPTER 613, F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTIONS:

1. Can the state of Wisconsin investment board hold title to real estate in Florida, making a long time lease thereon to a nationally known corporation and have the benefit of the judicial forums of our state for the purpose of fully enforcing their rights under the title ownership and lease?

2. Would this board be regarded under the laws of Florida as a foreign corporation and thereby be required to qualify under our laws as a foreign corporation?

3. Is there any constitutional, statutory or judicial pronouncement which might make the proposed investment undesirable to the board?

I have reviewed Mr. Farrior's letter addressed to you as well as the Wisconsin statute relative to the Wisconsin investment board. I find no Florida statute which would prevent the state of Wisconsin or the Wisconsin investment board from investing capital in real estate in Florida. Certain case law indicates that a sister state may not hold land in Florida if this state objects thereto (see *State of Georgia v. City of Chattanooga*, 44 S. Ct., 369, 264 U. S. 472, 68 L. Ed. 796; *Wayne County*

Court West Virginia v. Louisa and Ft. Gay Bridge Co., D. C., W. Va., 46 Fed. Supp. 1, and Dodge v. Briggs, C. C., Ga., 27 Fed. 160; and 81 C. J. S., States, §§104 and 216). Based on the limited information available to me at the present time however, I can see no objection to the state of Wisconsin investing money in real estate in Florida.

I have noted the comment by Mr. Farrior in his letter to you that the Wisconsin investment board "is a statutory agency and referred to in the (Wisconsin) statutes as a corporation, but actually it is not." After reviewing the Wisconsin statutes, I am inclined to agree with Mr. Farrior's statement that the Wisconsin investment board is not a corporation. The Wisconsin investment board is a specially created statutory state agency. The board apparently has no charter or by-laws, was not established under the corporation laws of the state of Wisconsin and has issued no stock. For these reasons, it is my opinion that the Wisconsin investment board could not fall in the category of a bona fide corporate entity and, therefore, could not meet the requirements of the Florida foreign corporation act. It follows from this statement then that the Wisconsin investment board could not be made to register with the secretary of state under the Florida foreign corporation act. It is, however, suggested that if the state of Wisconsin is willing, the Wisconsin investment board should be allowed to register as a foreign corporation doing business in this state even though the board does not meet all of the requirements of Ch. 613, F. S., pertaining to foreign corporations. The reason for this suggestion stems primarily from a precautionary desire to protect Florida citizens should any cause of action arise. If the Wisconsin investment board registers with the secretary of state then it would thereby appoint the secretary of state as its resident agent to accept service of process. I believe this precaution should be taken inasmuch as §25.17, Wisconsin Statutes, gives the board authority to sue but fails to make reference to defending suits. Registration with the secretary of state under the provisions of Ch. 613 would operate in favor of the state of Wisconsin as an implied consent of this state for the board to do business in Florida and at the same time the appointment of the secretary of state as resident agent to accept service of process would operate as implied consent on the part of the board to be sued in Florida. If this consent is granted by the board, then I see no reason why the judicial forums of this state would not be open to the board so that it might fully enforce any of its legal rights. It is presumed that any action by or against the Wisconsin investment board would be maintained in the name of the state of Wisconsin and that such activities of the board would be a proprietary function of that state which would deny the defense of sovereign immunity in the event a Florida citizen should be the plaintiff in such an action.

I find no constitutional, statutory or judicial pronouncement which might make the proposed investment undesirable to the Wisconsin investment board. However, one question comes to mind relative to whether or not the Wisconsin statutes are sufficiently broad to permit investment of the funds of the board in a sister state. This question is, of course, of little concern to the officials of this state but it might be well for the board

to request clarification from the Wisconsin attorney general or the courts of that state. Should the board desire to make an official inquiry of the Wisconsin attorney general it might be well to seek his advice on several other questions relative to this matter at the same time. Specific questions which would be of interest to this office are set out as follows:

1. Does the attorney general of Wisconsin consider the Wisconsin investment board a bona fide Wisconsin corporation which could do business in Florida under the provisions of Ch. 613, F. S., as a foreign corporation?

2. Does the attorney general of Wisconsin consider the activities of the Wisconsin investment board in Florida to be in the nature of sovereign or proprietary functions?

3. Does the attorney general of Wisconsin feel that the Wisconsin investment board may sue and be sued as any other corporation due to the implied limitations expressed in §25.17, Wisconsin Statutes?

The information contained herein appears to answer the questions set out above.

058-202—June 26, 1958

TAXATION

HYPNOTISTS, LICENSE TAX—CONSTRUCTION OF §§205.41 AND 205.411, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are persons who hold themselves out as hypnotists subject to the provisions of §§205.41 and 205.411, F. S.?

2. Is a hypnotist who practices hypnosis only in connection with medical science, and many times in association with a medical doctor, within the purview of the above-mentioned sections?

3. Is one who only teaches hypnosis in a school and only makes hypnotic demonstrations for the illustration to, and benefit of, his students subject to the requirements of §§205.41 and 205.411, or could he merely be licensed as a school under §205.55, F. S.?

4. Is one who performs hypnotic demonstrations, as a medium of entertainment on local TV channels and otherwise, within the purview of these sections of the law?

The licensing requirement of §205.41, F. S., is applicable to "every fortune teller, clairvoyant, palmist, astrologer, phrenologist, character reader, spirit medium, absent treatment healer, or mental healer, and every person engaged in any occupation of a similar nature . . ." (emphasis supplied).

Pursuant to the intent reflected in the foregoing italicized portion of §205.41, F. S., the comptroller adopted a regulation that included hypnotists as within the purview of such section.

Inasmuch as there have been several sessions of the legislature since the inclusion of hypnotists under §205.41, *supra*, by regulations of the comptroller, without indication of legisla-

tive disapproval thereof, I believe we can assume with little fear of contradiction that the legislature acquiesced in such interpretation by the comptroller. Further, as the Florida supreme court very clearly indicated in *Gay v. Canada Dry Bottling Co.*, 59 So. 2d 788, on p. 790 thereof:

Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of the statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

Now, since the practice of hypnotism has apparently become increasingly popular in the last few years, the inclusion of hypnotists within the provisions of §§205.41 and 205.411, F. S., is questioned. We do not believe that popularity, or what some may consider more acceptable uses of a practice, is sufficient justification for considering as improper that which was previously considered as a proper subject for a license tax. Your basic question is therefore answered in the affirmative.

Your questions 2, 3 and 4 are answerable by a consideration of whether the person holds himself out as a hypnotist or practitioner of hypnotism, or whether the person performs such function as an incident to his regular and chosen occupation. Examples of the latter would be: a doctor of medicine who employs such technique in surgical or obstetric cases, or a professor of psychology who demonstrates the technique to his class. There are no doubt many other areas wherein the person may employ hypnosis as an aid or adjunct to the main or prime occupation. In such situations the person should not be subject to §§205.41 and 205.411, *supra*. However, where the practice or teaching of hypnotism, is the main or prime function, or when there is entertainment given through the exclusive use of hypnotism by a person, the requirements of such sections are applicable.

Your questions are answered accordingly.

058-203—June 26, 1958

MOTOR VEHICLES

HIGHWAY PATROL—TRAFFIC OFFENSE CITATIONS— CONSTRUCTION OF §321.05(4) (a), (b), F. S.

To: H. N. Kirkman, Director, Department of Public Safety, Tallahassee

QUESTIONS:

1. What disposition may a highway patrol trooper make of an apprehended traffic violator?
2. Who should be furnished with a copy of the notice to appear which is issued to the traffic violator by the apprehending trooper?
3. Is a traffic violator amenable to a separate offense by his failure to appear as directed in a "citation" or notice to appear issued by a highway patrol trooper?

AS TO QUESTION 1:

In summary, three distinct methods are authorized a trooper

under §321.05(4)(a), F. S., when dealing with an apprehended traffic violator. He may:

(1) Deliver the alleged violator to the nearest and applicable sheriff, or

(2) Release the alleged violator upon the acceptance of a "cash bond or other sufficient security conditioned for his appearance before the proper tribunal of such county to answer the charge for which he has been arrested," or

(3) Release such violator upon his own recognizance.

AS TO QUESTION 2:

No matter what method of the three acceptable methods outlined in the answer to question 1 is used, the trooper should furnish the alleged violator with a "citation" or notice to appear similar to or substantially similar to the "citation" or notice to appear contemplated in opinion 055-150 of this office dated July 6, 1955, which appears below.

If the trooper chooses to employ the 1st described method in the answer to question 1, he should deliver to the sheriff a copy of the "citation" or notice to appear together with the traffic violator.

If the 2nd method is employed, the trooper should deliver the bond to the sheriff together with a copy of the "citation" or notice to appear.

If the 3rd method is applicable, the trooper should deliver a copy of the "citation" or notice to appear to the nearest applicable magistrate.

AS TO QUESTION 3:

The statutory provision applicable to the 3rd question is contained in §321.05(4)(b), F. S., which reads:

Any person so arrested and released on his own recognizance by an officer, and who shall fail to appear or respond to a summons, shall, in addition to the traffic violation charge, be deemed guilty of a misdemeanor.

In light of the foregoing, it is apparent that the additional offense of failure to appear is committed by an alleged violator who is released by the trooper through the 3rd method outlined in the answer to the 1st question. However, if method (1) or (2) is employed, the additional offense of failure to appear is not applicable until a summons has been issued and the alleged violator fails to respond thereto.

Your questions are answered accordingly.

July 6, 1955.

055-150

Honorable John A. Madigan, Jr.

Attorney, Sheriff's Association

Center Building

Tallahassee, Florida.

Dear Mr. Madigan:

Re: Certain informal methods of handling
minor traffic violations—*Opinion 055-90*

Referring to my opinion #055-118 of June 3, 1955, suspending opinion 055-90, and conferences regarding certain practical methods of handling minor traffic law violation cases that have been developed in several of the counties, which method may be described as follows:

A deputy sheriff or county patrol officer apprehends a traf-

fic violator at a considerable distance from the courthouse or the office of a committing magistrate. He recognizes the violator or identifies him by his driver's license, license tag number or otherwise and concludes that he can reasonably assume that there will be no attempt to escape or ignore the charge. The officer believes the circumstances at that time demand that he stay on duty patrolling the highway in order to give the maximum possible overall protection to the traveling public. Therefore he does not arrest and take the violator to the sheriff's office or to a magistrate. Instead, he gives him a "ticket", called a "summons", or "citation", the effect of which is that the person apprehended voluntarily agrees to go before a committing magistrate or to the sheriff's office at the courthouse or elsewhere at a time specified for further proceedings, such as formal charge, posting bond, etc.

Your question is substantially:

What effect, if any, does Opinion 055-90 have on the procedure outlined above?

The procedure described above and the "ticket", "summons" or "citation" constitute an informal arrangement for the convenience of the person apprehended and the officer. It is in no sense a warrant or court summons and has no legal status.

Since by that procedure the violator agrees voluntarily to appear at the time and place specified, it constitutes a waiver by him of his right to immediate arrest and commitment or bail, and consequently violates none of his rights.

Procedure in a sense analogous to that outlined above is authorized by officers of the Highway Patrol by subsection (4) of Section 321.05, Florida Statutes, except that by that subsection the Highway Patrol officer is authorized to obtain from the violator a "recognizance, cash bond or other sufficient security conditioned for his appearance before the proper tribunal . . ." See Opinion 054-177, page 381, Biennial Report of the Attorney General, 1953-1954.

There is nothing inherently illegal in the procedure outlined in the second paragraph hereof, provided it is not made the predicate for improper fees and mileage charges nor permitted to degenerate into lax law enforcement. Arrest fees and mileage charges should be computed from the point where the person appears for the formal arrest (court house, sheriff's office or appropriate magistrate's office) and further proceedings.

Opinion 055-90 dated May 30, 1955, and addressed to Sheriff R. L. Kendrick, is released from suspension and is not modified.

Assuming that all required legal procedures will be faithfully performed by the officer subsequent to the issuing of the "ticket", "summons", or "citation", the opinion cited is not to be construed as precluding the informal procedure outlined herein. This answers your question.

058-204—June 26, 1958

JUDICIAL DEPARTMENT

COUNTY JUDGE—JURISDICTION OF RESTORATION OF MENTAL COMPETENCY OF PERSON DECLARED INCOMPETENT BY CRIMINAL COURT OF RECORD—§§394.22, 917.01, AND FORMER §§62.32-62.35, F. S.

To: William C. Brooker, County Judge, Tampa

QUESTION:

Does the county judge have power to judicially restore competency to a person who was declared incompetent in the criminal court of record; that is, does the county judge's court now have general jurisdiction in all cases of restoration?

Subsections (15) and (16) of §394.22, F. S., make provision for county judges to restore mentally incompetent persons to mental competency.

Subsection (15) (a) provides that "In all cases where any person who has been heretofore, or hereafter may be adjudged incompetent . . ." it shall be lawful to apply by petition "to the county judge of the county where the alleged incompetent was adjudged incompetent, or where such person may be living at the date of such application," to have the mental status of such incompetent inquired into. Construing this provision in the light of the fact that preceding subsections of §394.22 relate to proceedings for the adjudication of incompetency by county judges and require that an application for such an adjudication be made to the county judge unless he is absent or disabled, I think that in enacting subsection (15) the legislature intended that a county judge should have the authority to entertain a petition for the judicial restoration of mental competency only when the adjudication of mental incompetency has been made by a Florida county judge. This construction is strengthened by the fact that subsection (15) (e) requires that upon the entry of an order restoring to mental competency:

(e) *The county judge entering such order shall forthwith cause a certified copy thereof to be forwarded to the office of the county judge of the county where said incompetent was originally committed, and said certified copy of order of restoration shall be filed in the original proceedings of record in said county; and a certified copy thereof shall be forwarded to the office of the superintendent of the Florida state hospital. (Emphasis supplied.)*

As I see it, said subsection (15) (e) requires that if the order adjudging mental incompetency was entered by the county judge of "A" county and the order of restoration is entered by the county judge of "B" county, the county judge of "B" county must cause a certified copy of the restoration order to be sent to the county judge of "A" county and requires that the county judge of "A" county file it in the original proceedings of record in his office. Such a requirement would be pointless unless the legislature intended that a county judge have the power to enter a restoration order only when the adjudication of mental incompetency has been made by a county judge of this state.

Subsection (16) of §394.22 makes provision for restoration to mental competency by order of the county judge after a certificate of mental competency has been issued by the medical staff of the

hospital or institution to which the incompetent has been committed, attested as required by said subsection. Said subsection provides that after such a certificate has been issued the petition may be filed by or in behalf of the incompetent "in the county judge's court having jurisdiction of his case" for an order of restoration; and provides that before the petition can be filed, or at the time it is filed, the certificate must be filed in the office of the county judge where the judgment of mental incompetency and order of commitment were entered. As I construe these provisions, they authorize the filing of a petition for restoration to mental competency upon the basis of such a certificate only with the county judge who made the adjudication of mental incompetency.

This does not mean that there is no way to judicially restore to mental competency a person who has been adjudged insane in a criminal case or a person who has been adjudged insane outside of the state or who has been adjudged insane or mentally incompetent by a Florida circuit court in civil proceedings.

Section 917.01 deals with the examination of a defendant in a criminal case to determine whether his mental condition is such that he may be tried. It authorizes the court in which the criminal case is pending to make an adjudication as to whether the defendant is sane and, if he be found insane, to have him committed to the proper institution. It makes provision for the same court to thereafter determine whether the defendant has regained his sanity and, if it be found that he has, to proceed to try him in the criminal case. It provides that no defendant committed by a court to an institution by reason of the examination referred to in said section shall be released therefrom without the consent of the court committing him. I think that said §917.01 gives exclusive jurisdiction to the committing court to thereafter determine the sanity of the accused so long as the criminal case in which he was adjudged insane is pending in said court. If, however, the criminal case should be nol prossed before said court has adjudicated that the defendant has recovered his sanity, that court thereupon loses jurisdiction to inquire into the sanity of the defendant, with the possible exception that perhaps such jurisdiction is not lost if another charge based upon the same transaction is promptly made against the defendant (see *Trippodo v. Rogers*, 54 So. 2d 64).

If the court which has committed an insane person to an institution under authority of §917.01 thereafter loses jurisdiction in the manner hereinabove mentioned, or if a person has been adjudged mentally incompetent or insane by a circuit court of Florida or by a court of another state, I think that the circuit court has jurisdiction to entertain a petition for the restoration of judicial sanity despite the repeal by Ch. 57-417, of §§62.32-62.35, F. S., which authorized such courts to entertain petitions for restoring to judicial sanity persons adjudged insane. It is my opinion that the circuit courts have such jurisdiction without benefit of statute by reason of their common law jurisdiction over insane persons and their estates.

Said §62.32 provided for the filing of the petition or complaint in the circuit court of the county where the alleged lunatic was adjudged insane or where he was living at the date of the application. In the case of *McNeill v. Harlow*, 88 So. 127, an Ohio court had adjudged the appellee to be not possessed of sufficient capacity to take proper care of herself and her property and had appointed a guardian of her person and estate. Thereafter she removed to Florida

and filed a petition in the circuit court of Duval county, which entered an order adjudging that she was of sound mind, that she was capable of managing her own affairs, that she be immediately restored to her personal liberty, and that she was entitled to all of the property rights granted by the constitution and laws of Florida. On appeal it was contended that the circuit court had no jurisdiction. In rejecting this contention the supreme court of Florida said:

Even if the Florida statute (§§1962-1965, General Statutes of 1906, Compiled Laws of 1914; §§3230-3233, Revised General Statutes of 1920), [which sections later became §§62.32-62.35, F. S.] under which the proceeding was brought, has reference only to persons who have been adjudged insane in this state, *yet, independently of statute, the circuit courts of this state have general jurisdiction of nonsane persons and of their property in this state, and it does not appear that an appropriate adjudication was not made in this case, the person being a resident of this state and before the court.* Even if the decree of the Ohio court, adjudging the mental status of the party, was effective in this state, that decree being of a nature that of necessity contemplated its modification or vacation in that state, or in another state, if in the course of nature the party be restored to sanity and mental competency in another state, therefore the adjudication of the Florida court was not a violation of the Ohio decree. If the Ohio decree was without force in this state, and the party was a competent person in this state before the decree, no harm results from the decree. (Emphasis and interpolation supplied.)

It also appears from other cases decided by our supreme court that at common law equity courts had the care of the persons and estates of idiots and insane persons (First Nat. Bank of St. Petersburg v. McDonald, 130 So. 596; American Surety Co. of New York v. Andrews, 12 So. 2d 599).

In summation, it is my opinion that a county judge has no jurisdiction to enter an order restoring a mentally incompetent person to mental competency unless the original order adjudging mental incompetency was entered by a county judge of Florida.

058-205—June 26, 1958

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY LAW—INTERPRETATION OF §324.121, F. S.—Ch. 324, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTIONS:

1. When a person furnishes satisfactory evidence of being properly insured at the time he was involved in a motor vehicle accident can his driving and registration privileges be suspended thereafter under §324.121, F. S., if a judgment is rendered against him as a result of said accident for which his insurer is held not to be liable?

2. When a person is uninsured at the time of an accident but complies with the financial responsibility law by purchasing liability insurance and by securing a

release from the injured party, can his driving and registration privileges be suspended thereafter under §324.121, F. S., if the injured party's collision carrier obtains a judgment against him?

3. When a person is uninsured at the time of an accident but complies with the financial responsibility law by purchasing liability insurance and depositing security under §324.051(2)(f), F. S., which security is returned to the depositor one year later under §324.061(2)(c), F. S., can his driving and registration privileges be suspended thereafter under §324.121, F. S., if suit is filed after the deposit has been returned and a judgment is rendered against him as a result of the accident?

4. When an uninsured person is involved in an accident only as an owner of a motor vehicle can both his driving and registration privileges be suspended thereafter under §324.121, F. S., if a judgment is rendered against him?

Chapter 324, F. S., is not a compulsory motor vehicle public liability insurance law. Nor is it primarily concerned with motor vehicle public liability insurance. It is a financial responsibility law. Its sanctions apply only to those involved in an automobile accident or owners of vehicles so involved. The primary purpose of said Ch. 324 is to:

... provide financial security by such owners and operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle, so it is required herein that the owner and operator of a motor vehicle involved in an accident shall respond for such damages and show proof of financial ability to respond for damages in future accidents as a requisite to his future exercise of such privileges (§324.011, F. S.).

Those involved in a motor vehicle accident are required by said chapter to respond for damages in that accident, as well as to obtain public liability insurance or furnish other proof of financial responsibility as to future accidents, or suffer the loss of driving and registration privileges.

Section 324.111, F. S., provides:

Failure to satisfy judgment; copy to commissioner.—Whenever any person fails within sixty days to satisfy any judgment, upon the written request of the judgment creditor or his attorney it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this state, to forward to the commissioner immediately after the expiration of said sixty days, a certified copy of such judgment.

Section 324.121(1), F. S., provides:

Same; suspension of license and registration.—

(1) The commissioner upon the receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided

in this section, and in §324.141.

The sections quoted above, added to Ch. 324, F. S., in 1955, are not as clear as they might be concerning the "judgments" to which they apply. From the general purpose of Ch. 324 it is reasonable to infer that the judgments in question are limited to those arising out of motor vehicle accidents. Otherwise said sections clearly require that if a judgment is not satisfied within 60 days and it is certified to the commissioner, he shall suspend the driving and registration privileges of the person against whom the judgment was rendered.

AS TO QUESTION 1:

I assume for the purposes of this opinion that the reason the insurer is not liable is because the insured failed to give the required notice of the accident to the insurer or because he failed to cooperate with the insurer in defense of the suit for damages. I am of the opinion that, notwithstanding the fact that the individual in question had valid insurance in effect at the time of the motor vehicle accident, since by his own conduct he has rendered himself not financially responsible within the contemplation of Ch. 324, F. S., the sanctions provided by §324.121, F. S., may be imposed against him.

AS TO QUESTION 2:

On the facts as stated in the 2nd question, it has necessarily been judicially determined in the proceedings in which the collision carrier obtained its judgment that the release procured from the injured party was not a valid release at least insofar as it pertains to the claim to which the carrier is subrogated (see A. G. O. 050-298). I am of the opinion that the sanctions of §324.121, F. S., may be imposed.

AS TO QUESTION 3:

Section 324.061(2)(c), F. S., which provides that security deposited may be returned if the commissioner is not informed of the institution of court action for damages, has its legitimate purpose in not tying up resources indefinitely but has no direct bearing on §324.121, F. S. It should not be considered as a "statute of limitations" for imposition of the sanctions of the financial responsibility law. Notwithstanding the fact that an uninsured person need not maintain a deposit for more than one year to cover damages for which he may be found responsible, he must nevertheless remain in a position to satisfy any judgment rendered against him or suffer the sanctions of §324.121, F. S.

AS TO QUESTION 4:

Section 324.051(2), F. S., provides that 30 days after a motor vehicle accident the commissioner shall suspend the *licenses* of all operators and the *registrations* of all owners of motor vehicles involved unless financial responsibility is shown. Section 324.121, F. S., provides that the driving and registration privileges of any person against whom a judgment has been rendered shall be suspended. Notwithstanding the fact that an owner's driving license is not suspended under §324.051(2), F. S., it shall be suspended under §324.121, F. S., if the commissioner receives a certified copy of a judgment against said owner.

All four questions are answered in the affirmative.

058-206—June 26, 1958

EDUCATION

COUNTY SCHOOL SYSTEM—PERSONNEL, DRUNKENNESS
AS GROUND FOR SUSPENSION OR DISMISSAL—

§203.23(5) (h), F. S.

To: *Marion B. Knight, Attorney, School Board, Calhoun County,
Blountstown*

QUESTION:

Is drunkenness which occurs away from the school not during school hours, grounds for removal or suspension of a member of the instructional staff of a county school board?

Section 230.23 (5) (h), F. S., provides, in part:

Suspension and dismissal.—Suspend or dismiss members of the instructional staff and other school employees; . . . provided further, that the charges must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude. . . .

The language in the statute providing drunkenness as a ground for suspension or dismissal of a teacher is not confined to drunkenness while on duty at the school during school hours.

Although the conditions under which the offense took place might be considered by the school board in determining the degree or seriousness of the offense, the fact that the drunkenness did not occur while the teacher was on duty would not bar action by the board under said provision.

Subject to the above comment, your question is answered in the affirmative.

058-207—June 27, 1958

CRIMINAL PROCEDURE

ISSUANCE OF COMMITMENT—SENTENCE, ORAL—RECORD-
ATION IN MINUTES—§922.01, F. S.To: *J. Louie Carter, Clerk Criminal Court of Record, West Palm
Beach*

QUESTIONS:

1. What is the proper procedure to be followed by a clerk of a criminal court of record in issuing a commitment under an orally pronounced judgment and sentence which have not been recorded in the minutes of said court?

2. Is the form of commitment which is hereinafter set forth legally sufficient when the defendant has been sentenced to pay a fine and, in default of payment, to serve a term in the county jail?

AS TO QUESTION 1:

I think that the answer to this question is implicit in my opinion 058-147, which I rendered to you under date of April 25, 1958. To restate the answer in more explicit terms:

Section 922.01, F. S., requires that upon the commitment of a defendant to the custody of the sheriff to serve a sentence imposing a penalty other than a fine only or death, a certified copy of

the sentence shall be delivered to the sheriff. This statute applies to all commitments issued by you because the death penalty is not imposed in a criminal court of record and no commitment would be issuable if the court should impose a fine only without imposing an alternative term of imprisonment to be served in default of payment. It is my opinion that a certified copy of the sentence cannot be furnished where the sentence has been pronounced orally and has not been recorded in the minutes. Therefore, I think that the procedure you should follow in issuing a commitment where the judgment and sentence under which it is issued have been pronounced orally is that you should forthwith record the judgment and sentence in the minutes and then issue a commitment and transmit it to the sheriff along with a certified copy of the sentence as recorded in the minutes. Although §922.01 does not require the transmission to the sheriff of a certified copy of the judgment (adjudication of guilt) I think that it would not be inappropriate for the certified copy transmitted to the sheriff to include the judgment as well as the sentence.

AS TO QUESTION 2:

This question relates to the legal sufficiency of the following form of commitment which you transmitted to me, to-wit:

In the Criminal Court of Record
PALM BEACH COUNTY, FLORIDA
COMMITMENT
STATE OF FLORIDA

vs.

case no. _____

Defendant _____

Information For: _____

JUDGMENT AND SENTENCE

YOU, _____
having pleaded guilty to _____

THE COURT now adjudges you to be guilty of said offense. What have you to say why sentence should not be imposed upon you? Saying nothing sufficient, it is, The JUDGMENT of the Court and the SENTENCE of the law that you pay a fine of _____ (\$ _____) and in default thereof be confined in the Palm Beach County Jail for a term of _____

DONE AND ORDERED in open Court at West Palm Beach, Palm Beach County, Florida, this _____ day of _____, A.D. 195 _____.

Judge _____

TO THE SHERIFF OF PALM BEACH COUNTY, FLORIDA:

The above named defendant having been convicted of the aforesaid offense and sentence having been pronounced against the defendant as of this date, the defendant is hereby committed to your custody for the execution of said sentence.

This is to certify that the above and foregoing is a true and

correct copy of the Judgment and Sentence in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, this the _____ day of _____, 195_____.

J. LOUIE CARTER, CLERK
CRIMINAL COURT OF RECORD

By _____
Deputy Clerk

Since there is authority to the effect that a commitment should run in the name of the state (24 C.J.S. 161, Criminal Law, §1608), and since it has been the custom for commitments to the state prison to do so, I suggest that commitments to the county jail should also run in the name of the state, whether under sentences imposing unconditional terms of imprisonment or whether under sentences imposing fines or fines and costs and ordering jail sentences to be served in default of payment.

I think that if the above form were changed so as to substitute the words, "In the name of the State of Florida, to the Sheriff of Palm Beach County, Florida," in lieu of the words, "To the Sheriff of Palm Beach County, Florida," said form, although the part which follows the judgment and sentence could be better worded, would be legally sufficient if the wording of the judgment and sentence set forth therein is the same as that employed by the judge in pronouncing judgment and sentence. Different judges use different phraseology in pronouncing judgments and sentences, and the clerk should record a judgment and sentence in the form in which they are pronounced by the judge, from which it follows that a certified copy should also be in the form pronounced by him.

058-209—June 30, 1958

REGULATION OF PROFESSIONS AND VOCATIONS
BARBERS' SANITARY COMMISSION—EXAMINATION OF
APPLICANT FOR CERTIFICATE OF REGISTRATION—
§476.09, F. S.

To: *Barbers' Sanitary Commission, Tallahassee*

QUESTION:

In an instance where an applicant for a certificate of registration to practice in Florida as a registered barber teacher, registered barber, or registered apprentice is given an examination by the barbers' sanitary commission and such applicant attains and receives a passing grade in the practical portion of the examination but fails in the written portion, may the barbers' sanitary commission re-examine said person at the next examination on the written part of the examination only?

Section 476.09, F. S., provides as follows:

The commission shall conduct examinations of applicants for certificates of registration to practice as registered barber teachers, registered barbers, registered apprentices and examinations to determine the educational fitness of applicants to enter a school of barbering not less than four times each year at such time and place as the commission may determine. The examination of

applicants for certificates of registration as registered barber teachers, registered barbers and registered apprentices shall include both practical demonstrations and written and oral tests, and shall embrace the subjects required in §476.07 to be taught in schools of barbering approved by the commission.

It would appear that if a person successfully passes the practical aspect of barbering, that is to say, if he demonstrates his technical ability as a barber but has difficulty with the written examination, which, of course, includes the knowledge of the law of the state, relating to the regulation of barbers, barber teachers and apprentices, that no useful purpose could be gained by requiring such person to repeat the practical demonstration at a subsequent time. The Florida board of pharmacy has construed Ch. 465, F. S., in a similar manner. If a person passes the practical examination but fails the written, the next time he is examined, he is examined by the board only on the written portion of the examination.

It is my opinion that the barbers' sanitary commission has the discretionary authority, once a person has passed the practical examination of the board, to examine him only on the written portion of the examination the next time the applicant comes before the board.

This answers your question in the affirmative.

058-210—June 30, 1958

PUBLIC LANDS AND PROPERTY

BULKHEAD LINE FIXED BY MUNICIPALITY PRIOR TO
PASSAGE OF CH. 57-362—ACCEPTANCE BY BOARD OF
COUNTY COMMISSIONERS—§253.122-253.0013

To: *Van H. Ferguson, Director, Trustees Internal Improvement Fund, Tallahassee*

QUESTION:

MUST the board of county commissioners adopt a bulkhead line fixed by a municipality, pursuant to statutory authority, some years before the passage of Ch. 57-362?

Your question contemplates a bulkhead line which was fixed pursuant to a local act, prior to the bulkhead act, and which required no public notice. Also, whether such bulkhead line is automatically accepted under the bulkhead act or requires some sort of formal acceptance by the board of county commissioners.

In answering your question, I assume the constitutionality of all statutes involved since it is the established policy of this office not to pass upon the constitutionality of a legislative act. Based upon this assumption I will proceed to answer your question.

Section 2 of Ch. 57-362, which is §253.122, F. S., provides that the board of county commissioners or the governing body of any municipality may fix bulkhead lines. . . . "provided however that where any bulkhead line has been located and fixed by any municipality pursuant to statutory authority, such bulkhead line shall be accepted and adopted by the county commissioners of the county wherein such municipality is located as its bulkhead

line within the territorial area of such municipality subject to the provisions of this act."

It is apparent from reading §253.122, F. S., in its entirety, the legislature was referring to bulkhead lines fixed prior to June 11, 1957, the effective date of the act. Thus, the board of county commissioners *must* accept a municipality's bulkhead line, fixed prior to June 11, 1957, within the area of the municipality subject to the provisions of Ch. 57-362, if it was fixed pursuant to statutory authority.

The language of the act makes it mandatory on the board of county commissioners to accept such lines. Since the board has no discretion in the matter, no action is necessary on their part and the municipal bulkhead line automatically becomes the bulkhead line under §253.122, F. S.

When a municipality establishes a bulkhead line subsequent to June 11, 1957, it does so under Ch. 57-362, and must meet all requirements of that act.

Your question is answered in the affirmative.

058-211—June 30, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SALE OF SECURITIES—SOLICITATION OF UNLIMITED
PARTNERS—§517.02(1), F. S., DEFINING "SECURITIES"**

To: C. Wilson Cogswell, Director, Florida Securities Commission,
Tallahassee

QUESTION:

Does the solicitation of limited partners constitute solicitation of subscriptions to participate in profit-sharing agreements or transferable beneficial interests in profits or earnings included under the definition of securities in §517.02(1), F. S.?

An examination of Ch. 620, F. S., reveals that limited partners are very similar to general partners in that they contribute capital and share in the profits, but are not bound by the obligations of the partnership and may carry on any business which a partnership without limited partners may carry on. We also see that the contribution of limited partners may be cash or other property *but not services*, and a limited partner's interest in the partnership is personal property and assignable.

Under Ch. 517, F. S., a security is defined as including an "evidence of indebtedness, certificate of interest or participation, . . . certificate of interest in a profit-sharing agreement, or the right to participate therein, . . . investment contract, or beneficial interest in title to property, profits or earnings, interest in or under a profit-sharing or participation agreement or scheme, or any other instrument commonly known as a security . . ." (§517.02(1), F. S.). Although the following statement was taken from Securities and Exchange Commission v. W. J. Howey Co., 328 U. S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, text 1249, where the statutory definition in the federal securities act was under consideration, the definition in the Florida act is so similar in many respects as to make the following language of the federal court applicable to the Florida Statutes by analogy, to wit:

The term "investment contract" is undefined by the

Securities Act or by relevant legislative reports. But the term was common in many state "blue sky" laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *State v. Gopher Tire and Rubber Co.*, 140 Minn. 52, 56, 177 N. W. 937, 938. This definition of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves.

By including an investment contract within the scope of §2(1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims.

The following extracts taken from pp. 318, 319 and 320 of a recent work by Louis Loss on "Securities Regulation" (copyrighted in 1951) seem to bear upon the questions before us, to wit:

A great many other schemes—many of them of the Alice in Wonderland variety—have been brought under both federal and state umbrellas by this same process of looking through form to substance. If "certificate of interest or participation in any profit-sharing agreement" won't do for any reason, perhaps because there is no "certificate," "investment contract" furnishes the needed reinforcement. As we have seen, a writing is not essential for either an "investment contract" or a "transferable share" or an "interest . . . commonly known as a security."

The line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no "investment contract" is involved where a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, so long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others.

From the above statutes and authorities it would appear that the question should be answered in the affirmative, providing that the particular transaction does not fall under one of the exemptions as outlined in the statute.

058-212—July 1, 1958

FLORIDA HIGHWAY CODE

STATE ROAD DEPARTMENT—BOARD MEMBER, INTEREST IN SURETY BOND OF CONTRACTOR—§§337.12 AND 839.09, F. S.

To: *Wilbur E. Jones, Chairman, State Road Department, Tallahassee*

QUESTION:

May a member of the state road board as agent for a surety company properly process and execute on behalf of such surety company performance bonds required of contractors receiving contracts from the state road board?

Section 337.12, F. S., provides:

It is unlawful for the board or any member thereof, or any employee of the board or department, or any company, corporation or firm in which any member or employee of the board or department is in any way financially interested, to bid on, or enter into or be in any way interested in a contract for the working or building of any state road or for the performance of any other work in which the department may be concerned.

In opinion 051-79, dated April 5, 1951 (AGO 1951-1952, p. 729) we had occasion to consider §839.09, F. S., which prohibits a county board from purchasing "supplies, goods or materials for public use from any firm or corporation in which any member of such board is either directly or indirectly interested. . . ." There we held that while we doubted that fire insurance could be classified as supplies, goods or materials within the purview of the statute, the purchase would probably be contrary to public policy.

There is doubt whether the situation being considered falls within §337.12, F. S. However, this does not settle the question for we must still consider whether or not there is a violation of public policy.

In opinion 051-79, to which reference has been made above, we cited the case of *Stubbs v. Florida State Finance Co.*, 118 Fla. 450, 159 So. 527 where the court, at p. 528, said that "a public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested, or as to which he is acting as agent for another . . ." where there may be a conflict of interest. (See also 67 C. J. S. 406, §116 and *Fisher v. Grady*, 131 Fla. 1, 178 So. 852.)

With this authority in mind, the following is to be considered: the board member is interested in the contract of suretyship to the extent of receiving a commission; the matter of any extensions which may be requested by the contractor; the determination of whether or not the contractor has fully complied with the specifications of the contract and finally any default which may result from the contract. It is apparent there is a possible conflict of interest between proper performance of his official duties and representation of his principal as surety on the performance bond. Consequently, I feel that the proposed relationship is one contrary to public policy.

The question is answered in the negative.

058-213—July 3, 1958

REGULATION OF TRADE AND COMMERCE
LIQUEFIED PETROLEUM GAS REGULATIONS—UNAUTHOR-
IZED DISCONNECTION OF TANKS AND CYLINDERS
OWNED BY L. P. DEALERS—§§526.16 AND 526.22, F. S.

To: *J. Edwin Larson, State Fire Marshal, Tallahassee***QUESTION:**

A privately owned utility, distributing gas, is running its service lines to consumers being served by liquefied petroleum gas and is disconnecting the tanks and cylinders belonging to L. P. gas dealers without the knowledge and consent of such dealers and is leaving the tanks and cylinders in an unsafe condition. Is the state fire marshal empowered to take action to prevent the utility company from committing these acts?

Pursuant to §526.16, F. S., which empowers the state fire marshal to make, promulgate and enforce regulations pertaining to L. P. gas and L. P. gas equipment, the following regulation has been adopted:

11. No person, firm or corporation, other than the owner and those authorized by the owner so to do, shall connect or disconnect or transport or carry by any means of conveyance whatsoever, any cylinder or tank containing Liquefied Petroleum Gas, whether in the liquid or vapor state.

Serious problems of public safety are involved in the disconnecting of L. P. gas cylinders and tanks and the above rule has its legitimate purpose in insuring public safety. I am of the opinion that this regulation can be legitimately enforced against the private utility in question, however, it must be applied in terms of public safety and not in such a manner as will unreasonably restrict competition.

Said rule should not be construed to prohibit the private utility from disconnecting the L. P. gas tanks and cylinders under any circumstances. If after reasonable notice to the L. P. gas dealer said dealer does not disconnect his cylinders or tanks, the private utility should be permitted to disconnect them if it does so in a manner which leaves the tanks or cylinders in a safe condition. If the private utility should persist in failing to give reasonable notice and in leaving the tanks and cylinders in an unsafe condition, the state fire marshal may hold a hearing pursuant to §526.22, F. S., and issue a cease and desist order.

These observations seem to answer your question.

058-216—July 9, 1958

ELECTORS AND ELECTIONS
DEADLINE FOR FILING CANDIDATE'S QUALIFICATION
PAPERS—§99.061(1), F. S.

To: *R. A. Gray, Secretary of State, Tallahassee***QUESTION:**

Should the secretary of state accept the qualification papers, qualification fee and party assessment of a candidate who wishes to run for the office of U. S. congressman when said papers and fee are not tendered

until 10 minutes after noon on the 63rd day prior to the date of the 1st primary?

The statute covering the instant situation is §99.061(1), F. S., which provides:

Candidates for nomination of any recognized political party for state offices of secretary of state, attorney general, state comptroller, state treasurer, state superintendent of public instruction, commissioner of agriculture, state senator, member of the house of representatives, supreme court judge, circuit judge, state's attorney and *candidates for the offices of representatives to congress and United States senate, are required to file their qualification papers, pay the qualification fees and party assessment, if any has been levied, to the secretary of state at any time after noon of the first filing date, which shall be the seventy-seventh day prior to the first primary, but not later than noon of the sixty-third day prior to the date of the first primary in the year in which any primary is held.* (Emphasis supplied.)

In *Ross vs. Gore*, Fla., 48 So. 2d 412, at p. 415, the Florida supreme court said:

When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

The statute involved is clear and obvious on its face and it would appear that any one who fails to file the required qualification papers and fees by noon of the 63rd day prior to the date of the 1st primary, or noon of July 8, 1958, in this instance, has not complied with the law and I find no provision within the election code authorizing exceptions to the above quoted statute. It is noted that the complaining party in the instant situation states that his delay was occasioned by strong head winds which caused a delay in the arrival of his chartered plane. These strong headwinds are alleged to be an act of God and said act of God is the basis of his request for relaxation of the law in this instance. In this day and age when many airplanes encounter strong head winds at frequent intervals such weather conditions should be anticipated and sufficient time allowed for possible delays. In the opinion of the writer the delay was not caused by an act of God as it is commonly known.

My interpretation of the law herein appears to be substantiated by at least two opinions of the Florida supreme court. In *State ex rel Vining v. Gray*, etc., Fla., 17 So. 2d 228, at a time when our law required a candidate for state senator to qualify not later than Feb. 1, our court held that where the application, oath and fees of a person seeking to qualify as a candidate for said office did not reach the secretary of state until 1:00 a.m. on Feb. 2 because of lack of diligence of the transportation company and delay of said person in delivering them for transportation until after 12 noon on Feb. 1, *the secretary of state was not required to place such candidate's name on the primary election ballot.* In *State ex rel Taylor v. Gray*, Fla., 25 So. 2d 492, a person sought to qualify as a candidate for nomination for public office in the primary, filed proper qualifying papers before the deadline but, by error of both the person and the officer receiving such papers, did not pay the amount of qualifying fee

required; and on the authority of *State ex rel Vining v. Gray*, supra, the court held that *the person attempting to qualify had not met the requirements of law* prior to the deadline and hence should not be listed as a candidate by the secretary of state.

On the basis of the language found in §99.061(1), F. S., quoted above, and the two Florida supreme court cases cited above, it is my opinion that the secretary of state has no authority to accept the qualification papers and qualification fees presented at 10 minutes past noon on the 63rd day prior to the 1st primary by a candidate desiring to run for the U. S. congress or any other office mentioned in §99.061(1), F. S.

Your question is therefore answered in the negative.

058-217—July 10, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—BACK PAYMENTS—CH. 122,
§§122.02(2) AND 122.01, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

In determining the final compensation of a retiring employee, may salaries earned prior to 1945 on which back payments were made be included in the 10 best contributing years of the last 15 years prior to retirement?

Under certain conditions as outlined in Ch. 122, F. S., state officers and employees, in order to receive credit toward their retirement for back years, may make contributions to the retirement system covering said years. Section 122.02(2), F. S., reads as follows:

“Average final compensation” shall mean the average salary of the ten best contributing years of the last fifteen years prior to retirement, or the career average since July 1, 1945, whichever is greater. A year shall be twelve running months. In the event that an officer or employee has not contributed to the retirement fund for at least ten years, then the average final compensation shall mean the average salary of the last ten years service.

Section 122.01(3), F. S., provides that the rights of members of the retirement system established by former Chs. 121 and 134, F. S., shall not be impaired nor shall their benefits be reduced by virtue of any part of this chapter. Chapter 22831, 1945, defines “annual final compensation” as the average cash compensation of an officer or employee during his last 10 years of service to the state. Chapter 121, F. S., was derived in part from said Ch. 22831 and consolidated with Ch. 134, F. S., in 1955 as Ch. 122.

When the above statutes are read together it appears that a retiring employee's salary prior to 1945 on which back payments were made may be included in the 10 best contributing years of the last 15 years prior to retirement where rights of members of the retirement system were established under former Chs. 121 and 134, F. S., as to fail to do so would impair or reduce his benefits which is specifically prohibited as above set forth.

Your question is answered in the affirmative.

058-218—July 10, 1958

TAXATION

GROSS RECEIPTS TAXES—TELEGRAPH INTRASTATE
MESSAGES—§203.01, F. S.To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are telegraphic intrastate messages which are relayed through reperforator center at Atlanta, Ga., in fact interstate messages and the receipts from which are subject to tax on an apportionment basis only under §203.01, F. S.?

Section 203.01, F. S., provides in part as follows:

Every person . . . receiving payment for . . . the sending of telegrams and telegraph messages, shall annually, on or before the fifteenth day of March, report to the comptroller of the state, . . . the total amount of gross receipts derived from business done within this state, or between points within this state, for the preceding calendar year and, at the same time, shall pay into the state treasury the sum of one dollar and fifty cents upon each one hundred dollars of such gross receipts . . .

Upon first impression, it would appear that the case of *Central Greyhound Lines, Inc. v. Mealey*, 34 U. S. 652, would be controlling. In that case the court held that transportation which both begins and ends in a state though it traverses territory over another state is interstate commerce so as to restrict the state's taxing power. A careful study of this case, however, leads inevitably to the conclusion that it is not binding under the facts which are before us. Mr. Justice Frankfurter in the majority opinion said:

This case serves to remind once more that courts do not adjudicate abstractions such as "what is interstate commerce." Also, it again illustrates that even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry of whether a particular assertion of power by a state of such transaction offends the commerce clause. (USCA Constitutional Art. 1, §8, Clause 3) . . . regulation and commerce among the states both are practical rather than technical conceptions and naturally their limits must be vested by practical lines.

There is an additional distinction between the *Greyhound* case and the facts which are before us in that the *Greyhound Co.* would be required to follow the routes as outlined in its certificate of necessity and its authorization to transport passengers for hire.

The case of *United Gas Pipeline Co. v. Lee*, 17 So. 2d 553, is likewise not controlling because this case referred to gas delivered through pipelines in an uninterrupted stream under constant pressure from other states to customers in Florida. Also see *Gay v. United Gas Pipeline Co.*, 32 So. 2d 600.

In the case of *Jacksonville Gas Co. v. Lee*, 148 So. 189, the court made the following distinction:

The tax imposed by Chapter 14677 (1931) is a filing fee or tax upon the privilege of doing business as a corporation in this state, while the taxes imposed by Chapter 15658 (Ex. Sess. 1931) (substantially §203.01, F. S.) are

upon the business of receiving payment for gas and electricity "for light, heat or power and for use of telephones and for the sending of telegrams and telegraph messages." The statutes impose wholly distinct classes of privilege taxes. Both are excise taxes; one is a filing fee or tax in the nature of a franchise tax upon capital stock of corporations, and the other is in its essential characteristics a sales tax. The law-making power of the state may levy intrastate taxes upon the capital stock and also a tax upon the business of any or all private corporations, and may make just and reasonable classifications among corporations by exemptions or otherwise in making intrastate levies of excise taxes applicable to some corporations and not to others when there is a substantial basis for the classifications made, and there is no hostile or arbitrary discrimination. Excise taxes may be imposed upon some corporations and not upon others, and some corporations may be required to pay more kinds of excise taxes than other corporations when the classifications for the taxes have a reasonable basis and are not arbitrarily imposed on some and not on others

Telephone and telegraph corporations operating in this state are by statute subjected to special regulations and supervision that are not imposed upon electric and gas corporations.

. . . The imposition of a filing fee or tax under Chapter 14677, and also a business tax under Chapter 15658 (Ex. Sess. 1931), upon the appellant electric and gas corporations, when the latter tax only is imposed upon the telephone and telegraph corporations, does not deny to the appellant corporation the equal protection of the laws, since the exemption of telephone and telegraph corporations from the franchise tax under Chapter 14677 is predicated upon a permissible classification, and the tax imposed by Chapter 15658 (Ex. Sess. 1931) is properly applied to gas and electric corporations as well as to telephone and telegraph corporations.

Chapter 15658 in effect imposes a sales tax upon corporations, firms, and individuals receiving payment for . . . the use of telephones and for sending telegrams; and the validity of the statute has been considered

While no state can impose any tax or burden upon the privilege of doing business in interstate commerce, yet it has the unquestioned right to place property tax on the instrumentalities engaged in such commerce (Cleveland C. C. & St. L R Co. v. Backus, 38 Law Ed. 1041).

By whatever name the exaction by taxation of an instrumentality of interstate commerce may be called, if it amounts to no more than the ordinary tax upon property or just equivalent thereof ascertained by reference thereto, it is not open to attack as inconsistent with the constitution (39 Law Ed. 311).

Where the subjects of taxation can be separated so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction and will restrain the tax upon interstate commerce while permitting the state to collect that upon commerce wholly within its territory. The telegram is an instru-

ment of commerce. A single tax assessed under the statutes of a state upon the receipts of the telegraph company which were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. The collection of the taxes on that portion of the receipts derived from interstate commerce should be enjoined and the state should be permitted to collect the tax upon the property of the company and upon the receipts derived from commerce entirely within the limits of the state (*Ratterman v. Western Union Tel. Co.*, 32 Law Ed. 229).

In the file accompanying the request for opinion, other cases are cited which I believe to be distinguishable from this case. In the case of *Potomac Edison Co. v. State Treasurer*, decided Dec. 7, 1949, by the Maryland Tax Com. and digested by Commerce Clearing House, paragraph 80-315.13, is a case with regard to a franchise tax and would not have any bearing upon the case before us.

In dealing with an analogous question, the U. S. supreme court, in *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. ed. 565, 60 S. Ct. 388, 128 A. L. R. 876, stated the following:

Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce in any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.

But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 254, 82 L. ed. 823, 826, 58 S. Ct. 546, 115 A.L.R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the constitution leaves to Congress

The term "interstate commerce" as contemplated by the constitution is not a technical legal conception, but a practical one drawn on the course or business. *State v. Blasius*, 290 U. S. No. 1. Interstate commerce in order to be entitled to protection of the said constitution must be real and bona fide. The question whether it is so is open to inquiry, but the commerce thus protected is real commerce. A mere fiction of interstate commerce cannot be so availed of as to deprive a state of its power to enforce sound regulation of the use of its highways in intrastate commerce (*Blackmore v. Public Service Com.*, 183 A. 115). The state may make valid enactments in exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an indirect effect upon interstate

commerce (USCA, Constitution Art. I, §8, clause 3. *McLaughlin v. Cross*, 198 N. E. 356). The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce (*Brooks Packing Co. v. Willis*, 137 Pac. 2d 925). Interstate commerce means interstate commercial intercourse (*Pedersen v. Fitzgerald*, 30 N. Y. S. 2d 989).

From the above statutes and authorities, it appears that the state has the right to collect the tax on messages not in interstate commerce. It would not appear that the telegraph company, for its own convenience, relaying the message across the state line would of necessity place the message in interstate commerce to the extent that the state would lose its power to tax said message. If the message is between points within the state, it is in essence an intrastate message and would not lose that characteristic by the action of the telegraph company in sending it across the state line purely for its convenience. There is no showing that Florida collects any tax on messages from a point in Florida to a point outside Florida, not even on an apportionment basis.

The relaying of telegraphic messages between points within the state through a reperforator center outside the state does not, therefore, deprive the message of its intrastate characteristic, and the receipts from said messages are subject to tax.

For these reasons your question is answered in the negative.

058-220—July 10, 1958

REGULATION OF TRADE, COMMERCE & INVESTMENTS
MOTOR VEHICLE SALES FINANCE ACT—UNEARNED
CHARGES—CONSTRUCTION OF §520.09, F. S.—
§520.07(2) (d), (f), (g), (h), (4), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does the Florida motor vehicle sales finance act contemplate that the estate of a borrower, under a retail installment contract which includes credit life insurance coverage to the extent of the unpaid portion of the time balance, shall be entitled to a refund of the unearned charges upon the borrower's demise wherein such insurance satisfied the debt prior to maturity?

In our opinion your question should be answered in the affirmative for the following reasons.

Under the Florida motor vehicle sales finance act a retail installment contract must provide, among other things, for any amount included for insurance, and such amount is considered as a part of both the principal and time balances. Also included within the time balance is the finance charge which is predicated on the expected life of the contract (§520.07(2) (d), (f), (g), (h), F. S.).

If any insurance in a retail installment contract is cancelled, the unearned premium must be refunded and credited to the final maturing installments if any exist (§520.07(4), F. S.).

A refund credit for anticipation of payments must be given a buyer under a retail installment contract if the debt is paid in full before maturity (§520.09, F. S.).

Inasmuch as the premiums paid by the borrower were for insurance to cover the time balance, and inasmuch as the time balance, because of the subsequent accelerated payment of the entire debt, was in excess of the amount actually owed by the borrower, a refund of the unearned charges would be in order.

058-221—July 14, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
FLORIDA SECURITIES COMMISSION—DEALER'S SURETY
BOND CANCELLATION—§§517.12-517.15, F. S.**

To: *C. Wilson Cogswell, Director, Florida Securities Commission,
Tallahassee*

QUESTION:

Has the Florida securities commission fulfilled its obligation to the public when, after due process, it accepts a surety bond issued by a surety, which at that time is in good standing with the insurance commissioner, but which surety prior to expiration of the bond is forced into receivership and all bonds of said surety are canceled by operation of law?

Section 517.12(4), F. S., is as follows:

If the commission shall find that the applicant is of good repute and has complied with the provisions of this section, including the payment of the fee hereinafter provided, he shall register such applicant as a dealer upon his filing a bond in the sum of five thousand dollars running to the governor of the state, conditioned upon the faithful compliance with the provisions of this chapter by said dealer and by all salesmen registered by him while acting for him. Such bond shall be executed as surety by this state; provided, that nothing herein contained shall be held or construed to repeal, alter or in any manner change the provisions of §§517.13-517.15.

Section 517.13, F. S., in outlining the form of bond to be given by the dealer provides that either the principal or the surety may cancel its bond by giving 60 days written notice to the Florida securities commission. In the event of such cancellation by either the principal or the surety, no further obligation shall be incurred under said bond after the expiration of the said 60 days, but the liability of the principal and surety shall apply as set out in the statute as to any acts which may have occurred prior to the effective date of said cancellation. Liability under the statute is limited to actual cases of fraud or dishonesty committed by the principal or its salesmen in the sale of securities.

In the case of *State ex rel Municipal Bond and Investment v. Knott*, 154 So. 143, the court held that neither the character nor the amount of the security required by the above statute is unreasonable per se. The court further stated that the bond or security requirement of the statute, being reasonable in and of itself and made a legitimate part of the regulatory scheme designed to discourage acts of conduct injurious to the public welfare, is not unconstitutional as being beyond the scope of the state's police power.

It is common knowledge that under recognized underwriting

procedure it is extremely difficult, and in many instances impossible, to obtain a retroactive bond. It is also generally known that a considerable period of time is required between the time that a surety company is forced into receivership and the principal is notified of said fact and can make arrangements for a replacement bond.

Although not specifically required by the statute, it would appear from an examination of the statutes and authorities above outlined that the securities commission may and should require a new surety bond within a reasonable period of time in the event that the bond was canceled, but no authority can be found to require a retroactive bond where the old bond was canceled by operation of law through no fault of the dealer from circumstances over which he had no control. To require a retroactive bond, in view of the general underwriting procedure as above described, might well subject the bonding provision of the statute to attack as being unreasonable per se and interfere beyond the scope of the state's police power under the rule as outlined in the case of *State ex rel Municipal Bond and Investment Co. v. Knott*, supra, and *Riley v. Sweat*, 149 So. 48.

For these reasons, except as restricted above, your question must be answered in the negative.

058-222—July 14, 1958

TAXATION

TAX REBATE—GASOLINE USED FOR PURPOSE OTHER THAN MOTOR VEHICLE FUEL—§208.04, F. S.

To: T. M. Miller, Jr., Director, Lee County Mosquito Control District, Fort Myers

QUESTION:

May the Lee county mosquito control district receive a tax rebate on gasoline purchased for use in stationary engines and thermal adulticiding equipment and used as an ingredient of a chemical formulation for larvicides?

Your attention is respectfully called to §208.04, F. S., which is in part as follows:

An excise or license tax of six cents per gallon . . . is imposed upon every gallon of gasoline, . . . sold in this state, upon which such tax has not been paid or the payment thereof not lawfully assumed by some person handling the same in this state. This levy of tax is upon the consumer but shall be paid upon the first sale or transfer within this state . . .

Although the tax may ultimately fall on the federal government, sales of gasoline to contractors for use in construction of a military installation are subject to the state gasoline tax. *Standard Oil Co. v. Lee*, 145 Fla. 385; 199 So. 325. In *Amos v. Mathews*, 126 So. 308; 99 Fla. 1, 65, 115, this tax was held to be upon the privilege of selling gasoline and *not on the use of roads*. Even though the dealer may add the amount of tax paid or assumed to the sales price of the product sold, *it does not amount to a tax on the consumer*.

In the case of *U. S. v. Lee*, 153 Fla. 94, 13 So. 2d 919, the gasoline tax was held to be an "excise tax" on the privilege of sell-

ing gasoline; and, therefore, is a tax on the "dealer" and not upon the "consumer" since the test is not whether the consumer ultimately pays the tax, but whether the law in terms imposes the tax upon the consumer. Hence, the U. S. is not immune from the tax. The reasoning in this case would be equally applicable to a municipality, county or state.

An examination of the above statutes and authorities reveals that the gasoline tax is on the 1st sale of gasoline and not on the use of roads nor upon the consumer, and there is no exemption in the statutes which would cover its use as an ingredient of a chemical formula or its use in stationary engines and equipment.

For these reasons your question must be answered in the negative.

058-223—July 15, 1958

TAXATION

EXEMPTIONS—INTERNATIONAL CARPENTERS' UNION
BUILDING—CONSTRUCTION OF §192.06(10), F. S.—
§1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the two-story building wholly exempt from ad valorem taxation which is owned by the international carpenters union and the top floor of which is used by said union exclusively as their meeting hall and for other union purposes, and the ground floor is rented to other labor unions and is used by them for like union purposes?

Section 192.06(10), F. S., is as follows:

Real property owned and used by *labor organizations* with charters from national or international organizations which is used exclusively by them as *their* meeting halls, training halls or educational purposes is hereby defined as being property within the purview of §1, Art. IX, State Const., and entitled to tax exemption thereunder; provided, however, that this exemption shall only extend to the portion of a building used for such purposes and where any property owned by any such labor organization is used for commercial purposes it shall be subject to taxation. The portion of such building used for commercial purposes may be valued and placed upon the tax rolls separately from the portions entitled to exemption as aforesaid.

The intent of the statute appears to require an affirmative answer to the question. It is noted that the statute refers to plural "labor organizations" operating under "national charters." The fact that the ownership of the building is in one of such unions while both the owner union and its lessee, which is another such union, are using the building exclusively as a meeting or training hall or for other educational purposes appears to make no material difference. Under these specific circumstances the statute is satisfied as to both unions and the exemption obtains inasmuch as the statute grants said exemption to all such labor organizations where the elements of ownership and use are both present. It is not necessary that such ownership and use coincide in a single union

inasmuch as the statute is satisfied when it is shown that both ownership and use exist in labor organizations operating under national charters.

It would be a very technical construction of the statute if under these particular circumstances the real object of the statute were denied, that is, the granting of a tax exemption upon the building which is owned and used by labor organizations exclusively for union purposes. Moreover, the statute expressly provides that only such portion of the building as is used for commercial purposes shall be taxed. This means uses other than the use of the building as a meeting hall, training hall or for educational purposes.

The foregoing considered, the answer to the question is in the affirmative.

058-224—July 15, 1958

PUBLIC BUSINESS

DEVELOPMENT COMMISSION—USE OF MONEY APPROPRIATED UNDER §282.01(1) ITEM 13, F. S., QUADRI-CENTENNIAL COMMITTEE—§§288.03-288.10, F. S.

To: *Ford L. Thompson, Attorney, Florida Development Commission, Tallahassee*

STATEMENT OF FACTS:

The cities of Jacksonville, Pensacola, and St. Augustine have formed a quadri-centennial committee for the purpose of promoting and publicizing a seven-year celebration of the 400th anniversary of the colonization of these areas. This committee anticipates forming a corporation not for profit and will request the 1959 session of the legislature to establish a state commission and provide an appropriation to fulfill these purposes. Due to the great advertising value to the areas involved particularly and to the state in general, the budget commission has agreed to release \$50,000 from funds appropriated to the Florida development commission for the present fiscal year. The cities involved, their chambers of commerce and public-spirited citizens throughout the state, are donating time and money to this project and will continue to do so. The \$50,000 referred to above would be made available to the quadri-centennial corporation, a corporation not for profit, for the purpose of defraying the expenses of said corporation until the 1959 session of the legislature will have an opportunity to create a state commission and provide appropriation to fulfill the purposes for which the corporation is established.

QUESTION:

May the Florida state development commission release to the quadri-centennial corporation \$50,000 for the purposes outlined above, and if so what procedure should be followed to accomplish this result?

Section 288.03, F. S., provides that the general purposes of the Florida development commission shall be "to guide, stimulate and promote the coordinated, efficient and beneficial development of the state and its regions, counties and *municipalities* in accordance with present and future needs and resources and the require-

ments of the prosperity, convenience, comfort, health, safety and general welfare of the people of the state.

Section 288.03, F. S., provides, among other things:

For the accomplishment of such purposes, the commission shall have the power and authority to:

(1) . . . *Encourage visitors from other states and countries to come to Florida . . .* and in order to promote and develop business, agriculture, industry, commerce and employment for citizens of the state, to plan and conduct a campaign of *information, advertising and publicity* relating to the business, industrial, commercial, agricultural, educational, recreational, scenic, *historic*, transportation and residential facilities, advantages, products and *attractions of the state and all parts thereof . . .*

(2) Assist in carrying out any program of information, *special events* and *publicity* designed to attract Florida tourists, visitors and other interested persons from outside the state;

(3) Encourage and cooperate with other public and private organizations or groups in their efforts to publicize the *attractions* and agricultural and industrial advantages of the state;

(4) Promote and encourage the bringing to the state of conventions, sporting events and other special events or groups; (Emphasis supplied.)

Section 288.10, F. S., provides that the commission is authorized to encourage the organization of advisory boards or committees among interested groups of citizens, including those representing industry, commerce, business, civic affairs and other groups as the commission may deem advisable. Such boards or committees shall advise with the commission as to its work and the commission shall cooperate with such advisory boards or committees to secure the active aid thereof in the accomplishment of the aims and fulfillment of the duties of the commission.

Section 282.01, item 13, F. S., being the appropriation for the Florida development commission, includes "item b—Expenses—including direct advertising, promotion and publicity" would appear to be the item from which these funds may be expended. An examination of the budget commission report to the legislature for the biennium July 1, 1957, to June 30, 1959, reveals that the funds as appropriated above may be used for direct advertising, publicity and promotion as well as administrative expenses. While this report is not a part of the statute, it has been referred to by the courts in determining questions with regard to the general appropriations. (State ex rel. Knott v. Lee, 144 Fla. 164, 197 So. 681).

An examination of the powers and duties of the Florida development commission as outlined above leads inevitably to the conclusion that it would be authorized and required to assist the quadri-centennial committee in advancing its purposes, and under its appropriation could expend funds for this purpose.

This expenditure appears to be permissible within certain restrictions. The development commission should name the quadri-centennial committee as an advisory committee of the development commission as authorized under the statute above and should authorize a budget for quadri-centennial purposes in an amount not

to exceed \$50,000 to be used as outlined in the budget. The actual expenditures should be made by the development commission but on recommendation of the quadri-centennial committee. In the case of fixed salaries of personnel necessary to carry on the promotion of the undertaking, the same should be treated as development commission personnel but assigned to the quadri-centennial committee.

As restricted above, it appears that the development commission has the authority to enter into this type of program and your question is therefore answered in the affirmative.

058-225—July 21, 1958

ELECTORS AND ELECTIONS

CANDIDATES—ACCEPTANCE OF QUALIFICATION PAPERS TENDERED BY "INDEPENDENT" CANDIDATE— §§99.041 AND 99.061, F. S.

To: R. A. Gray, *Secretary of State, Tallahassee*

QUESTION:

Should the secretary of state accept the qualification papers and filing fee of a candidate who is not a member of a recognized political party?

I have carefully considered the situation outlined in your letter wherein you state that a potential candidate desires to run for congressman in the 1st congressional district but said person has not aligned himself with either of the presently recognized political parties and furthermore, he has told a representative of your office that he has considered himself an "independent" in politics. It is, of course, worthy to note that the records of your office indicate that there is no recognized political organization or party known as the independent party.

Section 99.041, F. S., provides for the printing of a candidate's name on the election ballot and it appears that compliance with §99.061, F. S., is a condition precedent to acquiring any privileges under §99.041, F. S. Section 99.061 deals only with the qualification of candidates for nomination to office by a recognized political party.

The following quote is found in *State ex rel Gandy v. Page*, 125 Fla. 348, 169 So. 854, at p. 857, and again in *Bowden, et al v. Carter*, 65 So. 2d 871, at p. 875, (Fla. 1953):

The primary election laws are a part of the general election machinery of the state. Under their present effect, as interpreted by this court, no candidate is eligible to have his name printed on the general election ballot as a candidate for elective office in opposition to major parties' candidates, if the latter have been nominated in the general June biennial primary elections.

In the light of the above cited authority, I am not inclined to recede from the position of this office taken in A. G. O. 052-284, 1951 Biennial Report of the Attorney General, p. 173, and A. G. O. 050-302, 1949 Biennial Report of the Attorney General, p. 141, wherein I held:

There is no provision in our election laws for the name of an independent candidate to be printed on the general election ballot in pursuance of petition of elec-

tors of the county. It is, of course, recognized that at the general election a voter is permitted to cast his vote for a "write-in" candidate.

Your question is therefore answered in the negative and I concur in your thought that the qualification papers and fee tendered by the potential candidate under discussion should be returned to him.

058-226—July 22, 1958

REGULATION OF PROFESSIONS AND VOCATIONS

FUNERAL DIRECTORS AND EMBALMERS—PROHIBITION AGAINST PRACTICE BY CORPORATIONS—§470.10(5), F. S.

To: *State Board of Funeral Directors and Embalmers for Florida, Jacksonville*

QUESTION:

May a man and his wife, who are licensed to practice funeral directing under the laws of the state of Connecticut, but not licensed either as funeral directors or embalmers under the laws of Florida, purchase a corporation known as the "Alan Wright Funeral Directors, Inc." of Hollywood, Florida, and operate said corporation in the practice of funeral directing and embalming when said corporation was not in existence on the date that Ch. 22617, 1945, became effective?

We have investigated the organization known as "Alan Wright Funeral Directors, Inc." in the secretary of state's office and have found that the corporation to which the Alan Wright Funeral Directors, Inc. purports to be a successor was organized on Dec. 15, 1930 and known as the "Peoples Burial Co."; that at said time the officers of the corporation were Joseph Hirshman, J. P. Holland and E. R. Allard, all of Miami, Florida; that said corporation was dissolved for nonpayment of corporate taxes on Nov. 23, 1938, and remained in that category until it was revived on Sept. 12, 1956 by paying three years taxes. The name of the Peoples Burial Co., as revived, was changed by an amendment on Sept. 24, 1956, to the "Alan Wright Funeral Directors, Inc." This organization lists Alan Wright as president, Doris Smith, secretary, both of Hollywood, Florida, and Joseph Hirshman, treasurer, Daytona Beach, Florida. The acknowledgment of Mr. Alan Wright's oath on the corporate papers is attested by Doris Smith and notarized by Joseph Hirshman, a member of the corporation.

Subsection (5) of §470.10, F. S., was enacted in 1945, at the time the Peoples Burial Co. was dissolved and was not in existence. The intent and purpose of the act was to prohibit corporations from engaging in the practice of funeral directing and embalming. The legislature realized that embalming and funeral directing is a profession and that it should not be engaged in by a corporation any more than should the practice of law or the practice of medicine, but it provided a savings clause to protect the rights held, at the effective date of the act, by a corporation, or the rights of an embalmer or funeral director engaged in the profession of funeral directing or embalming under a corporate name at the time of the enactment of Ch. 22617, 1945.

It does not appear that the corporate name of "Alan Wright

Funeral Directors, Inc." was in existence at the time the above cited law was enacted. Therefore, this corporation cannot practice funeral directing or embalming in Florida.

Having reached the decision that the Alan Wright Funeral Directors, Inc. has no right to practice funeral directing or embalming or hold itself out as qualified to so practice in Florida, it goes without saying that no such right could be transferred to a new purchaser of the corporation. Therefore, your question is answered in the negative.

058-227—July 22, 1958

REGULATION OF PROFESSIONS AND VOCATIONS

FLORIDA BEAUTY CULTURE LAW—HAIR COLORING DEMONSTRATIONS—CONSTRUCTION OF §477.03, F. S.

To: *Ethel M. Manning, Executive Secretary, State Board of Beauty Culture, Tallahassee*

QUESTION:

Is an agent of a manufacturer of hair coloring subject to the licensure requirements of the Florida beauty culture law when teaching or demonstrating his product exclusively to Florida licensed beauticians?

In defining the practice of beauty culture amenable to the licensing requirements of the Florida beauty culture law, §477.03, F. S., where applicable, provides that: "Any one or any combination of the following practices (when not done for the treatment of disease or physical or mental ailments and when done for payment either directly or indirectly or without payment for the public generally) constitutes the teaching and practice of beauty culture:

... (c) Singeing, shampooing, or coloring the hair or applying hair tonics

(e) Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person. . . ." (Emphasis supplied.)

Inasmuch as the agent of the manufacturer referred to in your question is not holding himself out to the public generally, I envision no violation of the beauty culture law. However, such practice should be subject to the strict control and surveillance of the state board of beauty culture inasmuch as the paramount intent of the Florida beauty culture law is to protect the public from the unlicensed and unqualified practice of beauty culture.

Such demonstrations, if performed on the public generally, would subject the practitioner to the licensing requirements of the beauty culture law. In *United Enterprises v. Dubey, et al*, 42 Fed. Supp. 60, 128 Fed. 2d 843, cert. den. 317 U. S. 669, 63 S. Ct. 74, the court stated, on p. 845:

A state, by legislation under its police power, may provide for the protection of the public health, the public morals, and the public safety. The Legislature of Florida plainly intended by this statute to prevent the spread of contagious diseases, to induce cleanliness and sanitation, and to insure the adoption of healthful standards throughout the beauty culture industry, and the interest of the public

welfare. . . .

In dealing with the same subject, the supreme court of Florida, in *Gillett et al v. Florida Univ. of Dermatology, Inc.*, 144 Fla. 236, 197 So. 852, held that:

The age, health, character and educational qualifications of applicants for certificates of registration to practice beauty culture, as well as certificates for junior operators to practice in Florida, as required by the act, were intended on the part of the legislature to prevent the spreading of communicable diseases *and protect the public generally* from unsanitary and unhealthful conditions that may possibly exist in a beauty shop, and likewise prescribe high standards looking to the betterment of health and sanitation and advancement of the welfare of the citizens of Florida. One of the methods employed to obtain these objectives was to maintain a supervision of the beauty shops, the apparatus and equipment used therein, the health of the beautician licensed to practice and the students desiring to become licensed, and to determine that each person should not have infectious, contagious or communicable diseases.

The health and welfare of the people of Florida were in the mind of the legislature when it prescribed the minimum educational requirements of a student to take up the study of beauty culture and the schools attended by the students whose training and occupation require them *to deal personally with the general public.* (Emphasis supplied.)

The conviction of an unlicensed and unqualified demonstrator of a manufacturer's cosmetic product was upheld in *State of Minnesota v. Sullivan, d/b/a Norman Cosmetic Studios*, 245 Minn. 103, 71 N.W. 2d 895. In this case the defendant demonstrated the manufacturer's cosmetic product *directly on the public* without having first qualified as a licensed beautician.

In light of the foregoing considerations, your question is answered in the negative, so long as the demonstration is not done "for payment either directly or indirectly or without payment for the public generally."

058-228—July 22, 1958

REGULATION OF PROFESSIONS AND VOCATIONS

BOARD OF EXAMINERS IN BASIC SCIENCES—LIMIT OF VALIDITY OF CERTIFICATE OF PROFICIENCY—LIMITATIONS ON RE-EXAMINATIONS—CONSTRUCTION OF §§456.08 AND 456.13, F. S.

To: M. W. Emmel, Secretary, Board of Examiners in Basic Sciences, Gainesville

QUESTIONS:

1. Can the board of examiners in the basic sciences under the existing law limit the validity of its certificate of proficiency in the basic sciences to a period of 5 years after issuance?

2. Can the board of examiners in the basic sciences under the existing law limit the number of times an applicant can take its examination?

The legislature, in the enacting of a statute complete in itself which declares a legislative policy, may authorize an administrative agency to prescribe rules and regulations for its proper administration. *Milk Commission v. Dade County*, 145 Fla. 579, 200 So. 83, 88.

The powers of an administrative agency are limited to those which are expressly or impliedly conferred by the statute giving birth to such agency and containing the reasons for its existence. *State v. Jacksonville Terminal Co.*, 90 Fla. 721, 106 So. 576, 587.

Authority that is indispensable or useful to the valid purposes of the statute may be inferred or implied from the authority expressly given. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So 969, 971.

Of further applicability to the questions presented herein is the general rule that authority given by statute to accomplish a stated governmental purpose confers additional implied authority to do everything necessary to accomplish a purpose that is not a violation of law or public policy (1 Fla. Jur., Administrative Law, §22).

The legislature conferred a general grant of power upon the board of examiners in the basic sciences to adopt and promulgate whatever rules the board deems expedient to carry the Florida basic science law into effect (§456.08, F. S.).

AS TO QUESTION 1:

In light of the foregoing applicable principles, and in consideration of the purpose of the basic science law to determine the present or current proficiency in the basic sciences of an applicant aspiring to practice in one of the healing arts, it is our opinion that the board is authorized under existing law to limit the period for which a certificate of proficiency in the basic sciences is valid.

AS TO QUESTION 2:

An applicant who takes the examination in the basic sciences and fails to attain the prescribed passing grade in only one subject is authorized by statute to take a re-examination in such subject, at the next ensuing examination given by the board, on application and payment of the prescribed fee. However, if the applicant fails to obtain the prescribed passing grade in more than one subject, he must present satisfactory proof to the board of further study in the basic sciences sufficient to justify re-examination (§456.13, F. S.).

The foregoing is obvious statutory authority for the allowance of a re-examination under prescribed conditions. However, inasmuch as the statute is silent as to the number of re-examinations, if any, which may be allowed, it appears to be an area wherein a ruling of the board is necessary. In light of the principles enumerated in the preface to this opinion, and the general grant of authority in §456.08, supra, to the board to provide rules which it "deems expedient" to carry out the purpose of the basic science law, it is our opinion that the board may limit the number of re-examinations allowable an applicant.

Your questions are answered accordingly.

058-229—July 22, 1958

NOTE
TAXATION

HOMESTEAD EXEMPTION—§§1, 7, ART. X, STATE CONST.;

REVISED BY 058-329 APPEARING

To: Roy E. Green, State Comptroller, Tallahassee

QUESTIONS ON PAGES 906-910 OF THIS VOLUME

Where the owner and occupant of a residence in Lake County heretofore entitled to homestead tax exemption under §7, Art. X, State Const., accepts employment in state government service that requires him to reside in Tallahassee and he moves to Tallahassee and lives there for a period of 14 years and rents his former homestead continuously for this period, but who maintains his voting registration and actually votes in his former home county and states that when his state employment is terminated he expects to return to his former homestead and actually occupy the property in question, is he entitled to homestead tax exemption under said constitutional provision?

The pertinent portion of §192.12, F. S., is as follows:

Every person who has legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home . . . as defined in §1, Art. X, of the constitution.

Section 192.14, F. S., provides that the word "permanent home" shall not be construed so as to require continuous physical residence on the property, but means only that place which the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places where he may from time to time temporarily reside.

Temporary absence will not deprive the homestead of its character and tax exemption (*Lanier v. Lanier*, 95 Fla. 522, 116 So. 867). As §7, Art. X, State Const., expressly refers to §1, Art. X, which relates to homestead exemption from execution or forced sale, the decisions relating to homestead exemption from forced sale are persuasive if not controlling in determining similar questions relating to homestead tax exemption. Under this section "the temporary absence from the homestead . . . in search of health, pleasure or for business reasons, will not deprive it of the homestead status." (*Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448, text 450). To retain his homestead rights, one leaving a homestead must in good faith intend to return at some future date; however, it is not essential that he should intend to return at any particular time in the future. Such intention is to be gathered from the declarations of the homestead claimant, his actions and the surroundings and environment accompanying his absence (40 C. J. S. 646, §166).

The temporary absence from the homestead when rented for the so-called "winter season" would not deprive the property of its homestead status (*City of Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529).

Mere absence for a long period of time is not of itself sufficient to establish abandonment of the homestead where the claimant never acquired another homestead and there was no showing that he did not intend to return, and aside from his absence there was no evidence of intention to abandonment (*Gerhart v. Quick*, 209 N. W. 544). "If the homestead is once acquired, *the length of the time of absence from it is not material*, but it must be temporary in the sense that it begins and continues with a fixed purpose on the part of the claimant of the homestead to return to the property and occupy it as a homestead." (210 S. W. 484).

There must be an intention, either express or to be implied from the facts in the case, to abandon the premises as a homestead before the owner thereof should be denied homestead exemption from taxation. A temporary renting of a homestead is not an abandonment thereof where there is no intention to abandon the premises as a homestead, and no other homestead has been acquired (40 C. J. S. 656). A temporary absence from the homestead while holding an official position has been held to be no prima facie evidence of abandonment of the homestead rights (40 C. J. S. 647) (A. G. O. 046-376 and A. G. O. 050-214).

Temporary absence will not deprive homestead claimant of his right, unless there appears that there was design of permanent abandonment (*L'Engle v. Forbes*, (1955, Fla.) 81 So. 2d 214). However the tax assessor was held to be without error in refusing homestead tax exemption under the facts as outlined in *McCullough v. Forbes*, (1950 Fla.) 47 So. 2d 780.

From the above statutes and authorities, it appears that the answer to your question depends upon whether there has been an abandonment of the homestead and this is a question of fact which must be answered by the tax assessor from all available evidence under the rules as declared by the court and under the facts of each case. This homestead exemption has no application to special assessments for special benefits to the property itself but only refers to general taxes (*State v. Henderson*, 137 Fla. 666, 188 So. 351).

This appears to answer your question insofar as it is capable of being answered.

058-230—July 18, 1958

PUBLIC LANDS AND PROPERTY

BULKHEAD LINES—FRESH WATER STREAMS—CH. 57-362
(253.122-253.0013, F. S.)

To: *Van H. Ferguson, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTION:

Does St. Lucie county have the authority to fix a bulkhead line for the north fork of the St. Lucie river which is a navigable fresh water stream?

Section 1, Ch. 57-362, provides a definition of the navigable waters included in the act. Under this definition all coastal and intercoastal waters *other than fresh water lakes, rivers and streams are included*. Thus, the North Fork of the St. Lucie river is not included in Ch. 57-362.

The 1957 legislature also enacted Ch. 57-1787, which author-

izes the board of county commissioners of St. Lucie county to fix bulkhead lines outside of any municipal limits, subject to the approval of the port and inlet district in the county as to so much of the line in the immediate area of lands owned or leased by any port or inlet taxing district, whose land, jurisdiction and authority will be directly or indirectly affected thereby. This act does not specifically exclude fresh water lakes, rivers and streams. It provides the regulation and control shall be applicable to submerged bottoms under intercoastal, tidal and navigable waters.

Generally where the language of a statute is clear and unambiguous there is no need for resorting to statutory construction and the statute must be given its plain and obvious, meaning (*Ross v. Gore*, 48 So. 2d 412). The legislature in Ch. 57-362, specifically limited the operations of the act to salt water, yet the same legislature passed Ch. 57-1787 and did not specifically limit its operation. The legislature is presumed to have knowledge of all laws passed relating to the same subject, *Tamiami Trail Tours v. Lee*, 142 Fla. 68, 194 So. 305. Thus, it was aware of the limitation of the general act regulating bulkhead lines, and must not have intended this limitation in St. Lucie county. I therefore interpret Ch. 57-1787, to include *all* navigable waters.

Although Ch. 57-1787 does not specifically require the approval of the trustees of the internal improvement fund, I believe that body should pass upon *all* bulkhead lines, whether located in salt water under the general act or in fresh water under an act such as the St. Lucie county special act. When two acts are passed in the same session of the legislature they should be read in *pari materia* and each should be given effect if that is possible. *Provident Life & Accident Insurance Co. of Chattanooga, Tenn. v. Mathers*, 157 Fla. 661, 26 So. 2d 814. In chapter 57-362 the legislature required the approval of the trustees before a bulkhead line becomes final. The obvious reason for requiring this approval is because sovereignty lands are vested in the trustees, and that body must make subsequent sales. The same reason for this requirement exists in the St. Lucie county special act. Also, §7 of the special act authorizes the trustees to cooperate with St. Lucie county in effectuating the purpose of the act through such rules as have been or may hereafter be adopted. The legislature apparently was referring to Ch. 57-362 of the same legislative session.

Thus, St. Lucie county can establish a bulkhead line for the North Fork of the St. Lucie River, but the bulkhead line should be approved by the trustees of the internal improvement fund before it becomes final.

058-231—July 22, 1958

ELECTORS AND ELECTIONS

DUTY OF SECRETARY OF STATE TO CERTIFY CANDIDATE WHEN HE KNOWS OATH TO BE FALSE

To: R. A. Gray, *Secretary of State, Tallahassee*

QUESTION:

Should the secretary of state certify a person as a candidate when he is aware that the candidate has sworn falsely to a material element in the candidate's oath contained in §99.021, F. S.?

I have carefully reviewed the facts contained in your letter setting out the question phrased above, said facts being substantially as follows:

A candidate for nomination to the office of state representative from Holmes county qualified in your office prior to the qualifying deadline (noon of July 8, 1958) and properly executed the candidate's oath wherein he swore among other things that he was a qualified elector of the state. Subsequently you were advised that the candidate was not a registered elector at the time he qualified for nomination in your office and furthermore he had never been a registered voter in Holmes county although said candidate did register with the supervisor of registration in Holmes county at 11:00 a.m. on July 9, some 23 hours after the qualifying deadline.

In regard to your question, I direct your attention to Davis, Attorney General, ex rel Taylor v. Crawford, 95 Fla. 438, 116 So. 41, wherein the court said at p. 42:

The law does not give the secretary of state any power or authority to inquire into or pass upon the eligibility of a candidate to hold office for the nomination for which he is running.

In the same vein, the court said in *State ex rel Hall v. Hildebrand, et al.*, 124 Fla. 363, 168 So. 531, at 532:

. . . it is true that the clerk of the circuit court has neither the responsibility nor the authority to pass judgment upon the supposed ineligibility of candidates for office who properly comply with the *form* of the primary laws governing their becoming a candidate for nomination in primary elections. . . . (Emphasis supplied.)

It would appear from the quoted language found in the two cases cited above that the secretary of state and the clerks of the respective circuit courts exercise a purely ministerial function in accepting qualification papers from potential candidates. In so doing, the qualifying officer has but one duty and that is to insure that the papers are in proper form. There is, however, no duty to look beyond the four corners of the qualifying instruments to ascertain the validity of the statements set out therein or the eligibility of the candidates who file them.

On the basis of the argument and authority set out above, it would appear that the secretary of state would be acting properly in certifying a candidate even though there was a material defect, other than a defect in form, in the candidate's oath or other qualifying papers. Accordingly, your question as set out in paragraph one of this opinion is answered in the affirmative.

058-232—July 22, 1958

SOCIAL WELFARE

REGIONAL HOUSING AUTHORITY—DELEGATION OF POWERS TO EXECUTIVE COMMITTEE—OPERATION WITHIN INCORPORATED MUNICIPALITIES—

§§421.03, 421.11 AND 421.29, F. S.

To: Northwest Florida Regional Housing Authority, Tallahassee
QUESTIONS:

1. Can a regional housing authority or authorities by resolution delegate an executive committee full power

to act on behalf of such authority or authorities with respect to any and all subject matters within their powers as prescribed by resolution of such authority or authorities?

2. Would the area of operation of a regional housing authority extend to incorporated cities and towns of a population above 2,500 when invited by such a city's housing authority to operate within its territorial boundaries?

AS TO QUESTION 1:

A reading of §421.11, F. S., indicates that this power is granted. The latter part of said section reads as follows:

Any authorities joining or cooperating with one another may by resolutions appoint from among the commissioners of such authorities *an executive committee with full power to act on behalf of such authorities with respect to any and all of their powers, as prescribed by resolutions of such authorities.* (Emphasis supplied.)

This authority appears to be plenary and complete in every respect and would cover financial transactions, expenditures of money, as well as other incidental matters.

Question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

While it is true §421.29(1), F. S., restricts the area of operation of a regional housing authority to such portions of the county which are not within the territorial boundaries of cities as defined in the housing authority act (§421.03, F. S.), however, this restriction insofar as cities are concerned would not apply where an appropriate resolution is adopted by a local housing authority of a city requesting cooperation of a regional housing authority. The restriction in §421.29, F. S., only relates to situations where there is no cooperative arrangement between two or more housing authorities. I see nothing improper or irregular in a city housing authority on its own volition adopting a properly worded resolution requesting and authorizing a regional housing authority to exercise certain powers which the city housing authority itself could perform. This cooperative arrangement represents an exception to the restriction which otherwise would apply under the provisions of Ch. 421, F. S.

Question 2 is answered in the affirmative.

058-233—July 23, 1958

CRIMINAL PROCEDURE

**COUNTY SOLICITOR—FILING OF INFORMATION
INCONSISTENT WITH INDICTMENT—§32.18(1), (4),
F. S. AND §9-e, ART. V, STATE CONST.**

To: Edward M. Booth, Assistant County Solicitor, Jacksonville
QUESTION:

Where a grand jury returns an indictment for manslaughter, does the county solicitor have the authority to raise the charge from manslaughter to second degree murder?

Your letter states that an examination of the sworn testi-

mony at the preliminary hearing leads you to believe that the facts amply justify the filing of an information for second degree murder.

The law permits the return of a second indictment against a defendant even though another indictment is pending against him for the same offense (*Eldridge v. State*, 9 So. 448; *Smith v. State*, 27 So. 868; *Knight v. State*, 28 So. 759; and 42 C. J. S. 888-889, *Indictments and Informations*, §34-a).

Moreover, the fact that an indictment is pending does not prevent the finding of another indictment for the same act as constituting a higher offense (42 C. J. S. 890, *Indictments and Informations*, §34-b).

By analogy, the fact that an indictment is pending does not prevent the filing of an information for the same act as constituting a higher offense, since a county solicitor has just as much power and authority to file an information for a noncapital offense as a grand jury has to indict for such an offense. To my mind, the situation is in legal effect the same as though the grand jury had returned two indictments, the first for manslaughter and the later one for second degree murder.

A county solicitor is a constitutional officer and no trial can be had in a criminal court of record except upon an information filed by him under oath (see §9-e, Art. V, State Const., and §32.18(1), F. S.). I know of no requirement of law that a county solicitor file an information upon the basis of an indictment, although he is permitted to do so by §32.18(4), F. S. He has the option to follow that course or to base an information upon sworn testimony, and the law leaves it to his discretion as to the degree of the crime to be charged by his information.

It is therefore my opinion that when a county solicitor has before him sworn testimony at a preliminary hearing which in his opinion makes out a case of second degree murder, he has full power and authority to file an information for second degree murder despite the fact that the grand jury has already indicted for manslaughter. Consequently, your question is answered in the affirmative.

058-234—July 25, 1958

TAXATION

UNUSED LIQUOR STAMP—CLASSIFIED AS CLASS "A" INTANGIBLE PERSONAL PROPERTY— §§561.46(5), (6) AND 561.47(1), F. S.

To: *M. B. Jones, Tax Assessor, Pensacola*

QUESTION:

In classifying unused liquor stamps, should the tax assessor report them as tangible personal property inventory, or class "A" intangible personal property, or disregard altogether?

Subsections (5) and (6) of §561.46, F. S., provide that certain taxes shall be paid by manufacturers and distributors on certain beverages and provide that the evidence of payment of said taxes shall be by stamps placed on the containers.

Section 561.47(1), F. S., provides for the sale by the state beverage director of these liquor stamps to distributors for cash

at 98¢ for each dollar's worth of stamps. In other words, the distributor is allowed a 2% discount.

I am informed by the beverage director that by far the most stamping of liquors at the present time is done by the manufacturers outside the state and that local distributors have very little stamps on hand at any one time due to the fact that they can be purchased daily if necessary. Further, any unused stamps can be turned back to the state and either cash or credit given for said stamps.

Therefore, it is my opinion that any stamps that a distributor might have on hand at the time the tax assessor inventories his property, that the stamps should be classified as class "A" intangible personal property, the same as petty cash.

058-235—July 28, 1958

LIMITATIONS

ACTIONS IN BEHALF OF STATE—UNIVERSITY OF FLORIDA, §§95.02 AND 95.021, F. S.

To: W. G. Hendricks, Business Manager, Board of Control, Tallahassee

QUESTIONS:

1. Does the statute of limitation apply to student loan fund notes, whether under seal or not, held by the university of Florida?

2. Does the statute of limitation apply to obligations by students and former students for services provided by the university of Florida?

3. Does the statute of limitation apply to obligations by non-students for services and materials provided by the University of Florida?

Section 95.02, F. S., provides:

Actions not affected by limitations.—This chapter shall not apply to any action by this state, or by any officer or persons in behalf of this state, or to any action by or on behalf of the trustees of the internal improvement fund, or the seminary or school fund, or the board of education of the state, or any county or municipal corporation, or school district within this state, or with respect to any moneys or property held or collected by any officer or trustee or his sureties.

Section 95.021, F. S., provides:

Certain limitations on actions by state, county, or municipal corporation.—

(1) The provisions of existing law, whether provided for in this chapter or any other chapter, whereby an action is barred if not commenced within twenty years, shall apply to any action by the state, or any of its agencies, or by any officer or persons on behalf of the state or any of its agencies, or by any county or municipal corporation of the state.

The university of Florida is an agency of the state. Therefore, all three of your questions are answered in the negative, unless the obligation comes within the 20-year limitation provided by §95.021, F. S., quoted above.

058-237—July 28, 1958

CORPORATIONS

USE OF "CLUB" IN CORPORATE NAME—§§608.62-608.65, F. S.

To: *R. A. Gray, Secretary of State, Tallahassee*

QUESTION:

Is it permissible for you, as secretary of state, to accept articles of incorporation from a group proposing to incorporate under the name of **THE KLUB HOUSE, INC.**, in view of §§608.62-608.65, F. S., relating to the use of the word "club" in corporate names?

In dealing with this matter we are faced solely with the propriety and legality of the use of the word "Klub" in the proposed corporate name. If the word under consideration were spelled with a "C" rather than a "K" there would be no question that the acceptance of the articles of incorporation should be refused under the provisions of §§608.62, 608.63, 608.64, F. S., and the theories set out in A. G. O. 056-198, 1955 Biennial Report of the Attorney General, p. 719, and A. G. O. 052-255, 1951 Biennial Report of the Attorney General, p. 637.

The situation here is not in any way analogous to the issues considered in the Cliquot Club opinion (A. G. O. 046-330, 1945 Biennial Report, Attorney General at p. 660) or the Nite Club Tour-It-Yourself opinion (A. G. O. 057-371) wherein this office authorized the use of the word "Club" in a corporate name. There is no connotation in this instance that permits the use of the word "club" under the provisions of Ch. 608, F. S., cited above.

The only issue here is whether or not spelling the word with a "K" rather than a "C" is sufficient to take the word out from under the restrictions imposed by the statutes. If we are to consider the spirit and intent of the law, and we would be disregarding a fundamental rule of statutory construction if we were to do otherwise (see *Ervin v. Peninsular Telephone Co.*, Florida, 53 So. 2d 647, *Smith v. Ryan*, Fla., 39 So. 2d 281) we must hold that spelling of the word "club" with a "K" rather than in the conventional method is not a sufficient alteration to take it from within the provisions and restrictions of §§608.62-608.65, F. S.

Based on the arguments and authorities set out above, it is my opinion that your question as set out herein should be answered in the negative.

058-238—July 29, 1958

TAXATION

HOMESTEAD TAX EXEMPTION—§7, ART. X, STATE CONST.

To: *Darrey A. Davis, County Attorney, Miami*

STATEMENT OF FACTS:

The owner of a subdivision zoned for multiple dwelling erects on each lot a structure consisting of four two-story homes, each divisible by a party wall which, pursuant to a covenant running with the land and executed of even date with the date of the deed, is held in common with the adjoining family unit and which provides, among other things, as follows:

The interior walls separating the dwelling units . . . from the adjoining dwelling unit or units in the

building are hereby declared to be party walls of the owners and occupants of the dwelling units in the building; and said party wall shall be deemed to belong to the respective adjoining owners as tenants in common in equal halves and shall be used for the joint purposes of the dwelling units separated thereby.

The parties are prohibited from making any alteration or change in the dwelling unit which would structurally weaken the party wall and the dwelling owner is prohibited from interfering or diminishing the width of the party wall, and he is obligated to maintain said party wall in a good state of repair. The owner may not demolish any part of the building and must keep and maintain all portions of the building, interior and exterior, in good repair. The owner shall keep the property insured against fire, windstorm and other casualty in a sum sufficient to prevent co-insurance, and in the event of damage all insurance shall be used for reconstruction or repair, and the insurance collected shall be deposited in escrow in a bank to be paid out from time to time for the above purposes.

This party wall extends beyond the front and rear of each dwelling unit. Each unit has distinct architectural characteristics. The owner of the subdivision subsequently sold these units to private individuals as their homes, and each owner executed one of the party wall agreements, referred to above, representing to them that they could receive a full \$5,000 homestead exemption on each home unit. The claimants are otherwise qualified under §7, Art. X, State Const., and §192.12, F. S., to receive homestead exemption from taxation.

QUESTION:

Should the owner of each of the dwelling units receive a \$5,000 homestead exemption from taxation?

An examination of the circuit court file in the *Klein v. Gautier* case would seem to indicate that the court had drawn a distinction between the facts as outlined above and the facts in the case of *Overstreet v. Tubin*, 53 So. 2d 913; but an examination of this file would indicate that the party wall agreement and conditions of sale, which are referred to in the statement of facts above, were not introduced in evidence and also no appeal was taken from the decision in circuit court. In view of these facts the decision in the *Klein v. Gautier* case would only be binding upon the tax assessor as to the particular facts before the court at that time and only as to the particular year of taxes.

It would appear that the facts as outlined above would come within the rule of the case of *Overstreet v. Tubin*, supra, in which the court restated the rule as laid down in *Steuart v. State ex rel Dolcimascolo*, 119 Fla. 117, 161 So. 378, in construing the constitutional provision with which we are here concerned as follows:

Exemptions from taxation, whether stated in the constitution or in statutes, are to be construed against the claimant and in favor of the taxing power in cases of doubt.

and in which the court also said:

While there is no evidence here of bad faith on the part of the appellees, it is entirely possible that "the skill of the architect can be utilized" to plan a multiple dwelling containing even more than two units, each unit being separately owned, and together occupying less than the one-half acre contemplated under our Constitution as being the extent of only one homestead in cities and towns, and which would result in serious revenue losses to the local taxing authorities . . . "to prevent such a condition of affairs was the evident purpose of the quoted limitation of the constitution upon the exemption of homesteads from taxation, when it declares that "no such exemption of more than Five Thousand Dollars shall be allowed to any one person or any one dwelling house, . . ."

We think, then, that the only reasonable interpretation of the words "dwelling house," as used in Section 7 of Article 10, is that the whole structure of a multiple dwelling house, rather than each separate unit thereof, is meant; and it follows, therefore, that each owner of a separate unit is entitled to claim only his proportionate part of the \$5,000 tax exemption, based on his proportionate part of the assessed valuation of the entire structure.

While the question is not without some doubt, it appears that it should be answered in the negative. *This question should be submitted to a court of competent jurisdiction as soon as possible so that a ruling could be established finally determining the question.*

The determination of the evidentiary facts as listed above is the duty of the tax assessor, subject to review by the board of county commissioners sitting as a tax equalization board, and this opinion is predicated upon the facts as found by the tax assessor.

058-239—July 30, 1958

EDUCATION

RETIREMENT SYSTEM FOR TEACHERS—SURVIVORS' BENEFIT FUND—§§238.09(1)(c), (5) AND 238.07(16), F. S.

To: K. D. Farris, Director, Teachers' Retirement System, Tallahassee

QUESTIONS:

1. Must the teachers' retirement system use the exact gross salary paid each member as the basis for computing the deduction for the survivors' benefit fund?

2. If the survivors' benefit contribution is computed on the actual salary paid and later the member elects to make retirement contributions on the contract salary, should he also pay the .25% of the additional salary into the survivors' benefit fund?

Section 238.09(5), F. S., provides, in part:

(a) The survivors' benefit fund shall be the fund in which shall be accumulated all reserves for the payment of all survivor benefits provided for in §238.07(16), except refund of accumulated contributions. There shall be paid into this fund:

1. All contributions by members based on the rate of twenty-five hundredths per cent of their salary as set out in paragraph (b) of this subsection.

(b) The board of trustees shall annually certify to each employer, at the time it makes the certification to the employer under paragraph (c) of subsection (1) of §238.09, the rate of twenty-five hundredths per cent to be applied by the employer to the salary of each member who is compensated by the employer, and the employer shall cause to be deducted from the salary of each member on each and every payroll for each and every payroll period *an amount equal to twenty-five hundredths per cent of the member's salary paid by the employer* and the employer shall remit monthly such deducted amounts to the board of trustees who shall place the same in the survivors' benefit fund of the teachers' retirement system of the state. The amount of contributions by a member to the survivors' benefit fund shall, in no event, be refundable to the member or his beneficiaries.

Since the above cited act provides a deduction in "... an amount equal to 25 hundredths per cent of the member's *salary paid by the employer* ..." it seems clear that it was the intention of the legislature that the deduction should be made on the salary actually paid rather than on the amount provided in the contract. In other words, if a teacher is absent without pay, no deduction for that purpose should be made on salary which he would have been paid during said period had he not been absent. Your first question is answered in the affirmative.

Your 2nd question is answered in the negative for the reasons stated above.

058-240—July 30, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
SECURITIES EXEMPT WHEN SUBSCRIPTION RIGHTS
LISTED ON STOCK EXCHANGE—§517.05, F. S.**

To: C. Wilson Cogswell, Director, Florida Securities Commission,
Tallahassee

QUESTION:

Do the securities represented by transferable subscription rights enjoy an exempt status when such rights are listed on a recognized stock exchange as provided in §517.05(6), F. S.?

Section 517.05(6), F. S., is as follows:

Securities appearing in any list of securities dealt in on the stock exchange of New York, Boston, Chicago, or any other city of the United States of more than one million inhabitants, the board of trade of the city of Chicago or of the American stock exchange, and which securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to any securities so listed, or represented by subscription rights which have been so listed, or evidences of indebtedness guaranteed by companies any stock of which is so listed, such securities to be exempt only so long as such listings

shall remain in effect. The commission may deny this exemption with reference to any particular security listed on any of such exchanges, by order published in such manner as the commission shall find proper.

The recognized purpose of the exemptions provided by §517.05, F. S., is to facilitate free trading in securities that have been listed upon the national security exchanges. (A. G. O. 048-317 as reported in 1947-48 Biennial Report of the Attorney General, p. 480.) This provision has been sustained as within the power of the legislature in other jurisdictions and has been held to be reasonable and subject to no constitutional infirmity (*State ex rel Koencke v. Doherty*, 20 Pac. 2d 460; 87 A. L. R. 16).

In the above case the court held that the purpose of a statute, similar to the Florida statute, was to exempt securities which by reason of the character assured by their being listed on the stock exchange and by the public information in regard to them by reason of the publication of the market reports were not within the evil which the legislature intended to remedy.

It is common knowledge that prior to issuance of subscription rights all of the investigation necessary to listing the security on the exchange has been favorably completed and the issuance of subscription rights is merely for the purpose of allowing present stockholders first opportunity to purchase new issue of stock.

From the above statutes and authorities the securities represented by transferable subscription rights should be exempted under §517.05(6), F. S., after such rights are listed on the stock exchange as provided in said statute, and your question is therefore answered in the affirmative.

058-241—August 1, 1958

TAXATION

TAX ON LIQUEFIED PETROLEUM USED BY MUNICIPALITY

—§§209.01(4) AND 209.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a city required to pay excise tax on its liquefied petroleum used in its rolling stock under §209.02, F. S., as amended by Ch. 26718, 1951?

In attorney general's opinion dated December 21, 1939, designated 0-681, as reported in Biennial Report of the Attorney General for 1939-40, at pp. 518-519, the ruling was that counties, municipalities or any state governmental agencies were not included within the definition of "person" made by the act and therefore were not liable for the tax on the fuel used by them which is covered by this act. That opinion construed Ch. 19446, 1939, which defined the term "person" as follows:

(d) "Person" shall mean and include any individual, association, firm, copartnership, corporation, receiver, trustee, conservator, or other officer appointed by any state or federal court.

A distinction was drawn between this opinion and the case of *Orange State Oil Co. v. Amos*, 100 Fla. 884, 137 So. 707, wherein the municipality was held liable for the gasoline tax. The distinction was that the gasoline tax was an excise tax on

the privilege of selling gasoline, whereas the tax involved herein is a tax on the use of the fuel and is required to be paid by the user rather than by the dealer.

The statute referred to above, as amended by Ch. 26718, 1951, and §209.01(4), F. S., now provides that the term "person" as used in the law shall have the following meaning:

"Person" includes any individual, association, firm, copartnership, corporation, receiver, trustee, conservator or other officer appointed by any state or federal court, counties, municipalities, or other political subdivisions of this state.

Section 209.02, F. S., provides that an excise tax is imposed on all licensed user-dealers of special fuels upon the transfer or delivery of any special fuels into the fuel supply tank of any motor vehicle and "a like tax is also hereby imposed on any person using special fuel for propelling any motor vehicle over the public highways of this state on which the excise tax has not been paid. . . ."

The clear meaning of the amendment to the definition of the term "person" would be to include counties, municipalities or other political subdivisions within the class of persons required to pay the tax.

I express no opinion as to the constitutionality of the above mentioned act, as statutes duly adopted are presumed to be constitutional unless and until declared otherwise by courts of competent jurisdiction.

In view of the change in the statute, A. G. O. 0-681, dated Dec. 21, 1939, as found at p. 518, Biennial Report of the Attorney General, 1939-40, is hereby declared to be of no further force and effect and is superseded by this opinion.

In light of the above statutes and authorities, your question is respectfully answered in the affirmative.

058-242—August 4, 1958

INSURANCE

RETALIATORY LAW, CONSTRUCTION OF §626.061, F. S.—
§§205.45 AND 634.07(2), F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

When the domiciliary state of a foreign insurer doing business in this state imposes a higher premium receipts tax on insurers than that imposed by Florida, should the tax imposed by §205.45, F. S., be considered in computing the retaliatory tax under §626.061, F. S.?

Twice before I have considered this problem. By letter to you dated April 11, 1956, I stated that the tax imposed by §205.45, F. S., is not relevant in determining the retaliatory tax. In my opinion 056-160, dated May 24, 1956, I qualified my position on this question as follows:

While we recognize that this question has its controversial aspects, we adhere to the position set forth in our mentioned letter of April 11, 1956, to the effect that agents' licenses paid by a foreign insurer in Florida are not to be considered in applying the provisions of Ch. 29680. This general position is subject to the following

comments and possible qualification: If it can be demonstrated that under the laws of foreign states there is the provision that the premium receipts tax imposed is in lieu of other license taxes, including agents' licenses, . . . then such agents' licenses should be given consideration in applying the provisions of Ch. 29680 to insurers of such states operating in Florida.

The tax imposed by §205.45, F. S., is imposed against the insurer, not against the agent. If an agent represents more than one insurer, §634.07(2), F. S., requires that each insurer shall pay the tax imposed by §205.45, F. S. Thus the tax imposed by §205.45, F. S., is upon the privilege of employing agents.

The retaliatory law, §626.061, F. S., uses the following language: ". . . penalties, fees, charges or taxes greater than the penalties, fees, charges or taxes required in the aggregate for like purposes by the laws of this state . . ."

I am informed that other states having an "aggregate type" retaliatory statute give consideration to agents' license fees. It is said in 19 Appleman, Insurance Law and Practice, at p. 59: "In construing such statutes, the legislative intent must be ascertained and regarded, although a strict construction is given thereto, such acts being penal in nature, and not being applied to a case that does not plainly fall within the letter of the law."

The premium receipts tax, municipal and county license taxes, and the tax imposed by §205.45, F. S., are all fees, charges or taxes for the privilege of doing business in Florida. It is, therefore, my opinion that the tax imposed by §205.45, F. S., should be considered in computing the retaliatory tax pursuant to §626.061, F. S. Your question is answered in the affirmative.

058-243—August 5, 1958

INSURANCE

CREDIT LIFE AND CREDIT ACCIDENT AND HEALTH POLICIES—COUNTERSIGNATURE—VOLUNTEER STATE LIFE INSURANCE COMPANY— §§634.27(1) AND 646.08, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee
QUESTION:

A foreign insurance company admitted to do business in Florida, has closed its Florida office and is now countersigning credit life and credit accident and health policies at its home office by means of a stamp of the signature of a licensed Florida agent. Is such a procedure permitted by the laws of this state?

Subsection 634.27(1), F. S., provides:

It shall be unlawful for any life insurer to issue or deliver any policy of life insurance, group life insurance or annuity contract in the state, unless the application for such policy or contract be taken and the delivery of such policy or contract be made through a life insurance agent licensed under the law of Florida, who shall receive the usual commission due to an agent by such company. Each such insurer shall maintain a licensed life insurance agent at all times for the purpose of and

through whom policies or contracts issued or delivered in the state, shall be serviced. Provided, however, that the provisions of this paragraph shall not be applicable to policies of insurance or annuity contracts on nonresidents which are applied for outside of and delivered on the state of Florida.

Section 646.08, F. S., pertaining to credit life, accident and health insurance, provides in part as follows:

All policies to which this section is applicable shall be issued through a licensed agent. . . .

The phrase, "issued through a licensed agent," is not a description of the extent of the required participation of an agent in the issuance of an insurance policy, nor is such a description feasible. It is quite clear, however, that the law requires something more than that policies are stamped in another state with the facsimile signature of a licensed agent. It would appear that at a minimum each policy must go through the licensed agent's office.

Accordingly, your question is answered in the negative.

058-244—August 6, 1958

STATE INSTITUTIONS

SUNLAND TRAINING CENTER—PAYMENT OF CLAIM OF DECEASED INMATE FROM FUNDS OF INMATE HELD IN TRUST—§394.122(2), F. S.

To: *Terry C. Lee, Coordinator, Board of Commissioners of State Institutions, Tallahassee*

May funds held in trust by the Sunland training center in a patient's fund account be applied to the payment of an unpaid claim of the state against the patient upon his death or release?

Section 394.122(2), F. S., provides:

If a patient has died or has been released, any unclaimed money held by a superintendent or by the state treasurer for him in trust shall be applied first to the payment of any unpaid claim of the state against the patient, and any balance remaining unclaimed for a period of one year shall escheat to the state as unclaimed funds held by fiduciaries.

In accord with the above authority, your question is answered in the affirmative.

058-245—August 6, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS SHERIFFS—CONTRACTING FOR FEEDING OF PRISONERS —§§30.25 AND 125.45, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

1. May a sheriff contract with another person for the purpose of feeding prisoners rather than arranging for feeding as an operation of his office?

2. Does the answer to the 1st question apply to sheriffs operating under Ch. 57-368 as well as other sheriffs?

AS TO QUESTION 1:

In opinion 051-351, dated October 5, 1951 (A. G. O. 1951-1952, p. 787) we dealt with the question of whether or not the sheriff might properly require prisoners to prepare food. It was pointed out that the sheriff receives a fee for feeding prisoners "... and it is his duty to prepare the food or *have it prepared at his own expense*, and I don't think that he has any right to require prisoners to enhance his profit by doing the work of preparing the food." (Emphasis supplied.) The italicized language may be susceptible to the construction that so long as the food is prepared the sheriff is entitled to the fee and it makes no difference whether it is done under his supervision or he contracts with another.

Section 30.25, F. S., now reads:

Compensation for feeding prisoners.—For feeding prisoners the sheriff shall receive one dollar and twenty-five cents per day for each prisoner fed.

In *Smith v. State ex rel Thomas*, 114 Fla. 478, 154 So. 184, the court decided that the sheriff is entitled to the daily fee for feeding prisoners where such prisoners are kept for a substantial part of the day. The opinion states the statute does not designate the number of meals to be served or the hours, nor what should be served. "All these things are left to the reasonable discretion of the sheriff." The statute as it existed at the time of the decision in part read, "For feeding twenty prisoners, or less, sixty-five cents per day each; . . ." Therefore, except for the change in the fee to be paid the sheriff the statute today is substantially the same as at the time of the *Smith* case.

It should also be noted that the legislature in §125.45(1)(e), F. S., authorizes the board of county commissioners to pay for stove and kitchen utensils and table equipment "for the preparation of food and feeding of prisoners." Section 125.45(2)(c), provides the board of county commissioners *shall* furnish the equipment noted above. This would indicate that it is contemplated the food will be prepared by the sheriff. However, as pointed out in the *Smith* case, a reasonable discretion must be granted the sheriff for it is recognized that there are counties where the preparation of the food by the sheriff is not feasible and it is actually to the best interest of the sheriff and prisoners that he contract with an individual to supply the necessary food or buy the meals according to the need.

Hence the 1st question is answered in the affirmative.

AS TO QUESTION 2:

Chapter 57-368 does not abolish the discretion of the sheriff as to how the prisoners are to be fed. His budget would, of course, include an item for feeding prisoners and the manner of the expenditure comes within the discretion of the sheriff. This answers the 2nd question in the affirmative.

058-246—August 12, 1958

CRIMINAL PROCEDURE

WITHHOLDING OF SUPPORT FOR MINOR—RELEASE OF DEFENDANT BY COUNTY JUDGE UPON MAKING A SUPPORT BOND—§856.04, F. S.

To: Theron A. Yawn, Jr., County Judge, Starke

QUESTION:

May a county judge, upon the return of a criminal warrant issued by him upon a complaint charging a defendant with the offense of withholding support from his minor child under §856.04 F. S., (and before said judge has held the defendant to answer to a court having trial jurisdiction over said offense) set the bond and discharge the defendant in accordance with the provisions contained in the 2nd paragraph of said statute?

Section 856.04, F. S., deals with and provides penalties for the crimes of desertion and withholding the means of support, and then it goes on to say:

Provided, further, that the husband or wife, as the case may be, may at any time, either before or after conviction, appear before the court in which charged, and enter into a good and sufficient bond, payable to the governor of the state, in a sum to be fixed by the court, not less than one hundred dollars or more than one thousand dollars, conditioned that he, or she, as the case may be, will provide the wife and child, or children, or the wife where there is no child, or the child, or children, as the case may be, with necessary and proper home, food, clothing and care; or will, for such purposes, pay to a trustee, to be appointed by the court, promptly, as the court may by order require, weekly, monthly, or quarterly, such sum as the court may decide to be just and proper; or in the event such child or children be in a home or institution for children that he or she, as the case may be, will pay to the manager or superintendent of such home or institution the reasonable and necessary cost of the care and maintenance of such child or children therein, the amount and time for payments to be fixed by the court, whereupon the party charged shall be released from custody or further punishment under such charge. (Emphasis supplied.)

Said statutory provisions specifically authorize a defendant charged under §856.04 to appear before the "court in which charged" and enter into bond "at any time . . . before . . . conviction."

When a defendant has been charged before a county judge, by affidavit, with the offense of withholding the means of support from his minor child, I think that said defendant is "charged" within the contemplation of said statute and that therefore he may appear before the county judge before being held to answer the court having trial jurisdiction and make a support bond in accordance with said statute, and that thereupon the county judge should discharge him in accordance with said statute.

Said quoted part of the statute reflects the legislature's conclusion that it is more important for a man to make bond for the support of his dependents than for him to be prosecuted and

punished, and I think that the words of the statute evidence a deliberate intent to encourage the making of support bonds at any time after a nonsupport prosecution is instituted, in whatever court, even after conviction.

Accordingly, it is my opinion that your question is properly answered in the affirmative.

058-247—August 15, 1958

CONSERVATION

GAME AND FRESH WATER FISH—LICENSE, FRESH WATER FISH—RESIDENT AND NONRESIDENT—§§372.65 and 372.001(1), F. S.

To: *E. T. Heinen, Game and Fresh Water Fish Commission, Tallahassee*

STATEMENT OF FACT:

Mr. John B. Jones moved from Kentucky and established his residence in Leesburg, Florida, last year and was issued a resident bait dealer's license. In applying for a license for the 1958-59 license year Mr. Jones makes application on his letterhead stationery which states:

JOHN B. JONES
Wholesale Live Bait

Leesburg, Florida
Nov. 1st-April 1st
Tel. STate 7-2985

Richmond, Kentucky
April 1st-Nov. 1st

Mr. Jones requests that his license be mailed to him at 813 Heath Street, Richmond, Kentucky, stating that same is his temporary address. Upon being advised that he would need to purchase a nonresident license, Mr. Jones stated that he has never actually changed his official residence from Leesburg and is entitled to a resident license.

From a further reading of your letter of August 1, 1958, it is assumed that Mr. Jones is engaged in the wholesale business of selling fresh water fish for bait purposes in Florida.

QUESTION:

Under the foregoing circumstances, is Mr. Jones required to purchase a resident or nonresident wholesale fresh water fish dealer's license?

Section 372.65, F. S., provides, among other things, that no person shall engage in the business of wholesale or retail fresh water fish dealer until such person has taken out a license to carry on such business. A license fee of \$500.00 is required of a nonresident wholesale dealer, and a fee of \$50.00 is required of a resident wholesale dealer.

Section 372.001(1), F. S., defines a "resident" or "resident of Florida" as including citizens of the U. S. who have *continuously*

resided in this state, next preceding the making of their application for hunting, fishing or other license, for the following periods of time, to wit: for six months when applied to the fresh water fish and game laws.

The above definition appears to have been derived primarily from §1, Ch. 13644, 1929, where the word "resident," as applied to fresh water fish and game statutes, is defined as a citizen of the U. S. who has "lived in Florida for at least six months immediately preceding the making of application for a license" to take fresh water fish or game. Resident was defined in §1, Ch. 11838, 1927, in substantially the same words as in the 1929 act. Under §§1292 and 1293, R.G.S., 1920, and §§19 and 20, Ch. 6969, 1915, and §§25 and 26, Ch. 6535, 1913, "any person who has been a bona fide resident of the state for one year then last past" was entitled to procure a state or a county hunting or fishing license.

"The residence of a party consists of facts and intention (Warren v. Warren, 73 Fla. 764, 75 So. 35, L.R.A. 1917 E. 490). Residence indicates place of abode, whether permanent or temporary (Minick v. Minick, 111 Fla. 469, 149 So. 483). A resident is one who lives at a place with no present intention of removing therefrom. Tracey v. Tracey, 62 N.J.E. 807, 48 A. 533." (Kiplinger v. Kiplinger, 147 Fla. 243, 2 So. 2d 870, text 873; Fowler v. Fowler, 156 Fla. 316, 22 So. 2d 817, text 818). A "resident" has been said to be a person living at a fixed place of abode with a bona fide intention of remaining there, if not permanently, at least indefinitely (Smith v. Smith, Miss., 12 So. 2d 428, text 429). A person to be a permanent resident of this state does not have to be a citizen, in fact an alien may be a permanent resident of the state (Smith v. Voight, 158 Fla. 366, 28 So. 426).

Your question necessitates a construction of both residence and domicile. Domicile denotes a fixed permanent residence, to which when absent, one has the intention of returning. Residence simply indicates the place of abode, whether temporary or permanent (Minick v. Minick, 149 So. 483). There is no definite period of time necessary to create a domicile, and one day may be sufficient provided the intention to create a domicile exists. The habitation may not be continuous and temporary absence does not affect it (17 Am. Jur. 604). To abandon one's domicile there must be a choice of a new domicile with the intention that it be the principal and permanent residence, and the rule is well settled that a domicile once established continues until it is superseded by a new domicile and that the old domicile is not lost until a new one is acquired (see Minick v. Minick, 149 So. 483, 111 Fla. 469; Wade v. Wade, 113 So. 374, 93 Fla. 1004).

The supreme court of Florida said in Minick v. Minick, 149 So. 483, 487:

Residence as used in various statutes has been considered synonymous with domicile Generally where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent.

Perhaps the interpretation of no words used in legal phraseology has given the courts of this country more labor and difficulty, and has resulted in a greater variety of judicial opinion, than the interpretation of the words

"domicile" and "residence." Undoubtedly, much of the apparent variety and inconsistency in the decisions is due to the fact that the words "resident" and "residence," and "nonresident," as well as the word "domicile," are evidently used in a different sense in some statutes from that in which they are used in other statutes relating to different subjects.

When §372.65, F. S., is read in conjunction with §372.001(1), F. S., previous statutes and the above quoted authorities, it is my opinion that the term resident as used in §372.001(1) contemplates a person who has located in this state with a bona fide intention of living at a fixed place of abode, if not permanently, at least indefinitely, and who has continuously resided in this state for a period of six months next preceding the application for a wholesale fresh water fish dealer's license under said §372.65. (See A. G. O. 054-24.)

Your question is answered accordingly.

058-248—August 15, 1958

COURTS

JUVENILE COURTS—JURISDICTION—MINORS CHARGED WITH CAPITAL OFFENSE—§39.02(6), F. S.

To: *W. R. Culbreath, Judge, Juvenile and Domestic Relations Court, Miami*

QUESTIONS:

1. When a petition charging a 16-year-old boy with the commission of a capital offense is filed in a juvenile court, is the judge of said court required to thereupon make an order waiving the jurisdiction of the juvenile court and certifying the case to the court which would have jurisdiction to try the case if the child were an adult, without holding any hearing to determine whether there is probable cause to believe that the charge is true?

2. When the police bring a child into a juvenile court with a report setting forth facts which, if true, would warrant a charge of a capital offense, should a sworn petition be filed charging the child with being a delinquent child or should the juvenile judge, upon being advised of the facts without the filing of a sworn petition, simply enter an order waiving jurisdiction and certifying the child to the proper trial court?

AS TO QUESTION 1:

The governing statute is §39.02(6), F. S., which reads as follows:

(6) If the judge deems that any child brought into juvenile court as a delinquent child, who is fourteen years of age or older, and who, if an adult, would be charged with a violation of Florida law constituting a felony, should be transferred to the court which would have jurisdiction of the child if the child were an adult, or if any child brought into juvenile court as a delinquent child, and who, if an adult, would be charged with a violation of the laws of Florida, so demands prior to or at the commencement of the hearing before the court, the judge shall enter an order

waiving jurisdiction and certifying the case to the court which would have jurisdiction of the child if the child were an adult, and thereafter the child shall be subject to the jurisdiction of the other court as if the child were an adult; *provided, that a child sixteen years of age or older who, if an adult, would be charged with a capital offense, shall be so transferred*; provided, further, that jurisdiction over any child transferred under the provisions hereof shall revert to and be reinvested in the juvenile court making the transfer in the event that no criminal charge is brought against such child in the court to which he is transferred by the end of the next term of said court which commences after such transfer, or in the event that a criminal charge brought within that time is nolle prosequed or dismissed, and no further charge is brought in said court within sixty days thereafter; *providing further, that any child, irrespective of age, who if an adult, would be charged with a violation of Florida law punishable by death or life imprisonment and such offense is presented to the grand jury who returns an indictment against said child, then the juvenile court shall waive its jurisdiction of said child for said offense and shall transfer the child to the proper court having jurisdiction to try said offense.* (Emphasis supplied.)

This statute mandatorily requires that "a child sixteen years of age or older who, if an adult, **WOULD BE CHARGED** with a capital offense, shall be . . . transferred" to the court which would have jurisdiction if the child were an adult. Who is to say whether a 16-year old child would be charged with a capital offense if he were an adult? Is that question to be left to the determination of the person who files the petition against the child? Is the juvenile court bound to conclude that a child would be charged with a capital offense if he were an adult merely because a sworn petition has been filed charging him with such an offense?

I think that the question of whether the child would be charged with a capital offense if he were an adult is a judicial question to be determined by the juvenile court and that the juvenile court should not waive jurisdiction and transfer the child to a trial court without first having heard sworn testimony and concluded therefrom that there is probable cause to believe that the child has committed such capital offense. It is the juvenile court's responsibility to make the determination, not that of the person filing the petition.

To my mind the situation is somewhat analogous to that which exists upon the making of an affidavit before a committing magistrate charging that a person has committed a felony. The magistrate cannot assume from the mere filing of the affidavit that probable cause exists for believing that the person charged has committed the felony charged. Unless the person charged waives a preliminary hearing, the magistrate must conduct such a hearing and must find from the evidence that probable cause exists before he is justified in holding such person to answer a trial court.

There is a further reason why a child charged with a capital crime should not be transferred to a trial court and jailed for an indefinite period of time without any determination by the juvenile court that there is probable cause to believe that the child has committed that offense. If this is done there is much more chance that

the state attorney, after inquiring into the evidence, will conclude that it is insufficient to justify presenting the case to the grand jury than there is that the state attorney will arrive at such a conclusion if the juvenile court has held a hearing and determined that the evidence is sufficient to show probable cause. In other words, the juvenile court's finding of probable cause is a much more reliable guarantee that probable cause actually exists than is a mere ex parte sworn petition which, at most, states the affiant's conclusions instead of facts, with the affiant usually having little or no personal knowledge of the facts. Illustrative of the averments of such petitions are those which, according to your letter, form the material part of the petition in the case with which you are now concerned, to-wit:

"That on or about 6-30-58, said child was implicated in breaking and entering the home of Mae Fleming, age 26, of 2375 N. W. 50th Street, and with a revolver forced her to have sexual relations with him, in Dade County, Florida."

It seems to be obvious that no judge could advisedly conclude from these sworn allegations alone, without hearing any testimony from witnesses having personal knowledge of the facts, that probable cause exists for believing the child guilty. Of course, it is possible that the state attorney might conclude that the evidence is insufficient even if the juvenile court has first determined that there is probable cause, but there is much less chance that this will happen if the juvenile court has first determined from the evidence that probable cause exists.

The fact that the juvenile court might erroneously determine that no probable cause exists for believing the child guilty of a capital offense and that therefore the child should not be transferred to a trial court does not militate against the conclusion which I have expressed above. No injustice to the state need result from such an erroneous determination. This is so because the concluding proviso of the above quoted statute mandatorily requires the juvenile court to waive jurisdiction of the child and transfer him to the proper court having jurisdiction if the grand jury indicts the child either for a capital offense or an offense punishable by life imprisonment. Therefore, if the state attorney should disagree with the juvenile court's finding of lack of probable cause, he can present the matter to the grand jury and if an indictment is returned against the child for a capital offense (or, for that matter, for an offense punishable by life imprisonment), the juvenile court must thereupon waive jurisdiction and transfer the child to the proper court having jurisdiction of the offense.

It follows that in my opinion your 1st question is properly answered in the negative.

AS TO QUESTION 2:

I think that the foregoing remarks will serve to substantially answer your 2nd question.

It is obvious from said remarks that a mere police report of facts indicating that a child 16 years of age or older committed a capital offense will not justify a juvenile court in waiving jurisdiction of the child and transferring him to a trial court. I think that not only should the juvenile court conduct a hearing but that such hearing should follow the filing of a sworn petition in accordance with §§39.04 and 39.05, F. S.

058-249—August 21, 1958

COURTS

JUVENILE COURTS—JURISDICTION OVER CHILD COMMITTED TO INDUSTRIAL SCHOOL—STATE BOARD OF INSTITUTIONS—§39.11, F. S.

To: Rufus O. Jefferson, Leon County Juvenile Judge, Tallahassee

QUESTION:

When an order of commitment to an industrial school has been entered by a juvenile court, does the court have the authority to terminate or revoke such order of commitment prior to the child's release from the industrial school?

Section 39.11(1)(c), F. S., relating to the powers of the juvenile court with reference to dependent and delinquent children, provides as follows:

(1) When any child shall be adjudicated by a juvenile court to be a dependent or delinquent child, the juvenile court having jurisdiction of the child shall have the power, by order, to:

(c) Commit the child to an industrial school, if the board of commissioners of state institutions is willing to receive the child thereat.

Section 39.11(2) provides that "Any order made pursuant to subsections (1) (a) or (1) (b) of this section may thereafter be modified or set aside by the juvenile court." It should be noted that (1) (c) quoted above is omitted from the provisions of subsection (2).

Subsection (3) of §39.11, F. S., provides as follows:

Any commitment made to an industrial school shall be for an indeterminate period of time, *any child so committed to be released when directed by the board of commissioners of state institutions rather than upon the order of the juvenile court committing the child*, but no child shall be held in an industrial school under a commitment from a juvenile court after becoming twenty-one years of age. The juvenile court, in committing a child, shall not lose jurisdiction, but shall discontinue exercising active control over the child while the child is committed to the school. The board of commissioners of state institutions shall notify the juvenile court which committed the child to the school, at least thirty days before releasing the child, and the juvenile court may thereupon resume control and thereafter make orders for the supervision of the child as may be proper. (Emphasis supplied.)

In view of the foregoing provisions it is my opinion that your question should be answered in the negative.

058-250—August 26, 1958

TAXATION

INTANGIBLE TAX ON UNPAID BALANCE DUE ON STOCK— §§199.05, 199.07, 199.11; §1, Art. IX AND §16, Art. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are stocks which are pledged as collateral for a loan subject to intangible personal property tax on their full value under Ch. 199, F. S.?

2. Where stocks are transferred to a corporation with the understanding that they are being transferred so that the corporation can use them as collateral to borrow money, are said stocks subject to intangible personal property tax on their full value by the corporation to which they are transferred under Ch. 199, F. S.?

As the law governing the above questions is basically the same, the questions will be discussed together.

Section 199.07, F. S., provides that every corporation in this state "owning or having control, management, or custody of intangible personal property which is subject to taxation under the Laws of Florida," shall file a sworn return of the same with the county assessor of taxes giving the character, description, location and full cash value of same according to the best of the knowledge and belief of the person making the return. Section 199.05, F. S., provides that the tax assessor shall assess all intangible personal property at its full cash value. Section 199.11, F. S., provides for the amount of the annual levy on the various classes of intangible personal property.

On the basis of the case of *Smith v. Lummus*, 149 Fla. 660, 6 So. 2d 625 and 153 Fla. 415, 14 So. 2d 897, the attorney general ruled in A. G. O. 058-165, dated May 21, 1958, that stocks purchased on margin or other forms of credit through a branch office of a stock brokerage firm engaged in business in the state with its principal office in another state was subject to intangible personal property tax on its full cash value if the balance due on the stocks or "debit balance" had its situs in the state. Bonds and other securities issued by public housing authorities of other states have been held subject to intangible personal property tax (A. G. O. 057-116, dated May 8, 1957). Where a business corporation holds shares of its own capital stock as treasury stock, same is subject to taxation as intangible personal property (A. G. O. 049-198, dated May 3, 1949, reported in 1949-1950 Biennial Report of the Attorney General, at p. 247).

This being a democracy "every parcel of property is expected to bear its due portion of the burden of government," unless exempted by law (*Bancroft Inv. Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 170).

Section 1, Art. IX and §16, Art. XVI, State Const., seem to contemplate the taxation of all valuable property within the state except such as may be exempted under said sections.

The answer to both questions appears to depend upon whether or not the intangible personal property is owned, controlled, managed or in the custody of the corporation and whether the same is subject to taxation under the laws of Florida. One nonetheless

"owns" personal property held by another in escrow to insure performance of a contract (*Chaplin v. Commissioner of Internal Revenue*, 136 F. 2d 298). Under a statute authorizing an assessor to assess all taxable property in his county to persons owning, . . . possessing or controlling it, the term "owner" may be so defined as to include a person possessing such interest in property that he has lawful possession of it (*Tilden v. Orange County*, 201 P. 2d 86).

The ability to pledge stocks to secure the payment of a debt would appear to be evidence of ownership and control of the stock where the same was transferred for that specific purpose or simply transferred without reservation. The fact that stocks were pledged as collateral for a loan would not reduce the full cash value, as the corporation pledging the stocks would have the use of them during the pledged period.

The above statutes and authorities lead inevitably to the conclusion that both questions must be answered in the affirmative.

058-251—August 26, 1958

TAXATION

TAXATION EXEMPTION ON LOTS OWNED BY CHURCHES—

§192.06(4), §1, Art. IX; §16, Art. XVI, STATE CONST.

To: *Ethel M. Gordon, Councilwoman for Finance, Oakland Park*
QUESTION:

Are vacant lots owned by churches exempt from ad valorem taxes?

The request for opinion does not specify whether the church landowners involved are incorporated or unincorporated, and as the rule as it applies to each is different, the question of necessity will be answered in the alternative.

Two provisions of the constitution are appropriate to the question presented, §1, Art. IX, and §16, Art. XVI. The first establishes a "uniform and equal rate of taxation" and "just valuation" excepts property "exempted by law for . . . religious . . . purposes." The second declares all corporate property taxable with certain exceptions in which is included that "held and used exclusively for religious . . . purposes."

The expression of the legislature on the matter of exemption from taxation of church real property (§192.06(4)) defines it as: "all houses of public worship and the lots on which they are situated, and . . . every parsonage . . ." Then there is added "but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship shall be taxed the same as any other property."

Under §1 of Art. IX and §192.06(4), *supra*, exemption of property for religious purposes is restricted to the church building and the lot occupied by it; therefore, the supreme court has held in the case of *Lummas v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, that these provisions of the organic law would not apply to the facts here for the reason that there is no house of worship located on the property.

From the above we must conclude that property owned by an unincorporated church which is vacant would not be exempt from taxation.

We must next consider the question of the incorporated church, which is the subject of §16, Art. XVI, which needs no

legislation to accomplish the result intended, and the exemption "unless . . . held and used exclusively for religious . . . purposes" is effective without enabling action by the legislature. In the case of *Lummus v. Miami Beach Congregational Church*, *supra*, the court held that continuous use of the property for the stated purposes was not necessary and also that it was not necessary to construct a building on the land in order to bring it within the exemption. This decision was referred to with favor in the cases of *Fleischer Studios, Inc. v. Paxon*, 147 Fla. 100, 2 So. 2d 293; *S. A. Freel Dist. Co. v. Lenox*, 147 Fla. 550, 3 So. 2d 157; *State v. Doss*, 150 Fla. 491, 8 So. 2d 17; *American Can Co. v. City of Tampa*, 152 Fla. 798, 14 So. 2d 203; and *Riverside Military Acad. v. Watkins*, 155 Fla. 409, 19 So. 2d 870.

In A. G. O. 051-38, dated Feb. 27, 1951, reported in 1951-52 Biennial Report of the Attorney General, at p. 276, it was held that an undivided one-third interest in a vacant lot would not be exempt from taxation if owned by an unincorporated church under §1, Art. IX, of the constitution, but that the same would be exempt from taxation if owned by an incorporated church under §16, Art. XVI, State Const., if the tax assessor finds that the property is held and used for some religious purpose.

From the above and foregoing we conclude that if the church owning the property is a corporation, the tax assessor should ascertain the use of the property, and if the same is found to be used for some religious purpose the exemption should be granted. This is a question of fact to be determined by the tax assessor on the basis of the facts in each individual case and the rules as outlined by the courts.

Your question is, therefore, answered in the negative as to property owned by unincorporated churches and in the affirmative as to property owned by incorporated churches when it is found that the property is used for some religious purpose.

058-252—August 27, 1958

ELECTORS AND ELECTIONS

CANDIDATES FOR POLITICAL OFFICE—EXPENDITURE BY
PRIVATE COMMITTEE—§§99.161(4)(a), (7), (9)
AND 104.27, F. S.

To: *Claude Pepper, Candidate for Democratic Nomination for
U. S. Senator, Miami*

QUESTION:

Is a private committee campaigning for a candidate required by the election code to receive authorization from said candidate's campaign treasurer in order to expend funds in behalf of the candidate?

Section 99.161(4)(a), F. S., provides:

No contribution or expenditure of money or other thing of value, nor obligation therefor, including contributions, expenditures, or obligations of the candidate himself or of his family, shall be made, received or incurred, directly or indirectly, in furtherance of the candidacy of any candidate for political office in the state except through the duly appointed campaign treasurer or deputy campaign treasurers of the candidate.

Section 99.161(7), F. S., provides in part:

No expenses shall be incurred by any candidate for election or nomination to political office, *or by any person, corporation, or association in his behalf, or in furtherance or aid of his candidacy, unless prior to the incurring of the expense a written order shall be made in and upon the form prescribed and signed by the campaign treasurer of the candidate authorizing the expenditure, . . .* (Emphasis supplied.)

Section 99.161(9), F. S., provides in part:

(a) Each state and county executive committee and each *organization, group, or other committee organized in support of a candidate or party* in any primary or election, shall make a report of the amount of money received from each candidate qualifying in the county or in the state, as the case may be, on the first Monday of the month following the closing date of qualification of candidates. Each such executive committee, organization, group, or other committee shall make a full and complete report of all moneys or other things of value contributed to them or to any member of such body and such report shall contain the names and addresses of each of the contributors and the amount contributed by each, *and a complete statement of all expenditures authorized, incurred or made by them, or by any member of said body, to the date of such report.* These reports shall be made by the chairman or secretary of the state or county executive committee, and by the chairman of all other organizations covered by this subsection, on the first Monday of each month following the first report preceding the election. The state executive committee shall file its report with the secretary of state and the county executive committee shall file its report with the clerk of the board of county commissioners. All other organizations shall file reports with the clerk of the circuit court of that county in which the greatest number of its members or contributors resident in the state may reside and shall, in addition, file a duplicate copy, duly certified, with the secretary of state if there be members or contributors residing in more than one county or in another state. (Emphasis supplied.)

In the case of *Smith v. Ervin* (Fla. 1953) 64 So. 2d 166, the supreme court of Florida declared that §§99.161(4) (a) and 99.161(7), F. S., are constitutional and do not violate the constitutional guaranties of freedom of speech or freedom of the press. Headnotes 2 and 4 of this case read as follows:

Statute providing that no expenses shall be incurred by any candidate for election or nomination to political office, or by any one in his behalf or in furtherance or aid of his candidacy, *unless written order shall be signed by campaign treasurer of candidate authorizing the expenditure*, is a valid exercise of the police power of the state and does not contravene section of the Declaration of Rights guaranteeing liberty of speech and of press. F.S.A., §99.161(7); F.S.A. Const. Declaration of Rights, §13.

* * * * *

A citizen of the State may purchase time on a radio station in order to voice his views in furtherance of candidacy of an individual, *if citizen has first obtained au-*

thorization from candidate's campaign treasurer. F.S.A. §99.161(4) (a), (7).

In my opinion 052-199, dated June 25, 1952, I held that §99.161(4) (a), F. S., applies even to executive committees of political parties.

All such contributions or expenditures, from permissible sources as above described, which may be made to or on behalf of any candidate, *must have been previously authorized by the campaign treasurer of the candidate* benefited in accordance with the law and all contributions of money or other things of value received by a candidate must be accepted and reported by him in the manner prescribed by law. No contribution by any committee to any candidate shall exceed one thousand dollars. (Opinion 052-199.)

I reaffirmed this view in opinion 054-180, dated Aug. 2, 1954, as follows:

Should a political party committee engage in the expenditure of any of its funds in behalf of one or more but less than all of its candidates running in a general election, such committee will find itself in the same position as an individual elector; and in such instance the conclusions reached in said former opinion 052-199 are applicable. In further explanation of the intent of the preceding sentence, if the political party committee in any instance engages in urging the candidacies of less than all its candidates, then the committee will be subject to the conclusions expressed in opinion 052-199.

While there appears to be an exception to §§99.161(4) (a) and 99.161(7), F. S., covering expenditures by an executive committee made in behalf of *all* candidates of a political party in a general election, there is no exception for private committees in behalf of a single candidate from the restrictions imposed in said subsections. It is not made the responsibility of a candidate to see to it that independent committees make expenditures only with the authorization of his campaign treasurer. However, it is the obligation of an independent committee to secure authorization from the candidate's campaign treasurer before expenditures are made.

We reach the foregoing conclusion because we cannot read §99.161(9), F. S., in isolation from the remainder of the election code, particularly §99.161(7), F. S. It must not have been the legislative intent to allow one set of individuals a free hand to collect and expend moneys in furtherance of a candidacy without any control or authorization by the candidate merely because they assumed some committee or organizational status while requiring all others who had not formed some kind of committee or organization to make expenditures only pursuant to the campaign treasurer's authorization. To so hold would in our opinion produce many untoward results contrary to the basic purposes of the campaign spending law and place candidates in untenable positions both in regard to the furtherance as well as the opposition of their candidacies insofar as the responsibility for the expenditures and the use of campaign funds are concerned.

We are informed that Hon. R. A. Gray, secretary of state of Florida rendered an administrative construction of Ch. 99, F. S., by letter under date of July 15, 1958, in which he came to the conclusion that independent committees may be formed and may

operate independently of the candidates they are supporting. From said letter the impression has been drawn that authorizations for expenditures by such committees from a candidate's campaign treasurer are not required. We are further informed that the secretary of state verbally advised some persons that §99.161(7), F. S., does not apply to such committees.

Our views on the subject differ from those of the secretary of state. We agree that the subject is not free from doubt and only a court of competent jurisdiction in a proper case can determine the matter with finality. We had not had occasion to consider the direct question pertaining to the relevant portion of §99.161(9), F. S., which was engrafted in the law by amendment at the 1955 legislature, until we received your telegram. Under these circumstances it may be concluded by the courts that those committees relying upon the secretary of state's administrative ruling have not knowingly or willfully violated the criminal provisions of the election code (§104.27, F. S.). It is also possible that the courts may hold that throughout the remainder of the current primary campaign continuation of expenditures by independent committees without authorization by the candidate would not be deemed willful and knowing violations inasmuch as said committees were relying upon an administrative ruling of the secretary of state and had made commitments for expenditures which could not be canceled prior to a final court determination of the question.

To summarize, it is my opinion of the applicable statutes that an independent committee is not authorized to make an expenditure in furtherance of a candidacy absent an authorization from the candidate's campaign treasurer; that a candidate is not responsible nor made accountable by said statutes for expenditures of independent committees which he has not authorized through his campaign treasurer; that during the current primary campaign expenditures of independent committees which apparently were made in reliance upon an administrative ruling of the secretary of state may be relieved by the courts from charges of willfully and knowingly violating the election code on the ground that they relied on such administrative ruling.

058-254—August 28, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY HOSPITAL, OKALOOSA COUNTY—Ch. 29338, 1953**

To: *Dr. Daniel D. Kirk, Secretary-Treasurer, State Board of
Chiropractic Examiners*

QUESTIONS:

1. Is the county hospital of Okaloosa county a tax supported institution?
2. If so, is it required to furnish laboratory service to patients of chiropractors?

The county hospital of Okaloosa county was created under the provisions of Ch. 29338, 1953, and may be considered at least a partly tax-supported institution. Therefore, for the purposes of this opinion your 1st question is answered in the affirmative.

In *Richardson v. City of Miami*, 198 So. 51, the supreme court of Florida held that "the board of trustees of hospitals supported by general taxation in the City of Miami could adopt a regulation

excluding from treatment of cases in such hospitals duly qualified and licensed osteopathic physicians and surgeons."

In view of the foregoing provisions and being unable to find any court interpretation to the contrary, it is my opinion that your 2nd question should be answered in the negative.

058-255—August 28, 1958

**PUBLIC LANDS AND PROPERTY
ACCRETIONS TO EXPOSED SOVEREIGNTY LANDS
CONVEYED**

To: *Van H. Ferguson, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTION:

Where a reef lying within the navigable salt waters of the state is conveyed by a metes and bounds description, said reef being dry land and sovereign in character, do accretions thereto inure to the grantee of said land?

"Where land fronting on a river or other body of water is conveyed by deed, the right to accretion . . . passes to the grantee . . . even where the land is described by metes and bounds, if notwithstanding such description, the stream or body of water is the actual boundary" (56 Am. Jur. Waters §481, pp. 896, 897). This is not true, however, if the deed of conveyance expressly reserves the same in the grantor (93 CJS Waters §206, pp. 1040, 1041).

This rule apparently covers two factual situations. The first is where the deed describes the water front as being the boundary itself. In this respect the district court of appeals held in *Mexico Beach Corp. v. St. Joe Paper Co.* 97 So. 2d 708, 711, that when a boundary is described as being a body of water, the water line continues to be the boundary, ". . . notwithstanding the fact that the geographic location of such waters may have been altered by accretion."

The second situation involves a conveyance by metes and bounds in which the water line is not mentioned. In such instances it has been held, that if at the time the land was conveyed the water line was in fact within the prescribed limits as defined in the deed, additions to the land subsequently formed by accretion vested in the grantee (*Jones v. Johnston* 59 U. S. 150). The district court of appeals impliedly accepted this holding in *Mexico Beach Corp. v. St. Joe Paper Co.* 97 So. 2d 708.

I am, therefore, of the opinion that if the boundary of the land in question was described as being the water line, or if the high water mark as it existed at the time of conveyance was in fact included within the boundary described by metes and bounds, the right to subsequent accretions inures to the grantee.

This opinion is applicable only to the situation considered and is not to be construed as the rule which may govern other facts and circumstances. Each additional case must be determined.

058-256—August 28, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—FIRE CONTROL DISTRICT—
CH. 27789, 1951 AND CH. 31065, 1955; §122.02(1), F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Do the full-time officers and employees of any fire control district created under Ch. 27789, 1951, as amended by Ch. 31065, 1955, come within the scope of state and county officers and employees retirement system, and are they required to be members of said system?

Fire control districts have been established under Ch. 27789, 1951, which repealed Ch. 26460, 1949, and as amended by Ch. 31065, 1955. This act as amended provides for the establishment and maintenance of fire control districts in parts of Orange county, outside municipalities and provides that the business and affairs of said district shall be conducted and administered by a board of five commissioners who shall be known as the fire control commission and are empowered to employ a fire chief and other employees, to fix their compensation, to purchase or lease and operate fire-fighting equipment, to provide water mains, to purchase land to erect thereon fire stations, to enter into insurance contracts, to accept gifts or donations of equipment or money and "to do any and all things necessary to provide proper fire protection for said district." (Emphasis supplied.)

The fire control commission is further empowered "by a resolution to adopt or amend rules and regulations governing the operation of said fire control district."

The act further provides that the fire control commission shall adopt an annual budget and submit same to the board of county commissioners and the board of county commissioners may by proper resolution establish rules and regulations regarding the issuance of requisitions and purchase orders and the payment of bills.

Section 7 of the act specifically provides that the establishment and maintenance of fire control districts "will confer special benefits upon the lands within the said district or districts," and the whereas clause provides that the establishment and creation of fire control districts in Orange county outside the boundaries of municipalities "is a direct and special benefit to homesteads and other property located therein."

In A. G. O. 058-65, dated Feb. 21, 1958, in holding that the officers and employees of the South Peninsula zoning district in Volusia county, and in A. G. O. 058-208, dated June 30, 1958, in holding that the officers and employees of the Long Key sewer district were not within the purview of Ch. 122, F. S., and were not required to be members of the state and county officers and employees retirement system; the rule was adopted that if there is an intention in the act of providing a service for the benefit of the district only, although there may be some indirect benefit to other areas of the county, then the district would not be an agency of the county, but an independent agency in a limited area of the county.

State and county officers and employees, within the purview of said Ch. 122, F. S., "include all full-time officers and employees who

receive compensation for services rendered from state or county funds, or from funds of drainage districts or mosquito control districts of a county or counties . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for services rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not . . ." (§122.02(1), F. S.). The circuit court (Judge Taylor) in a proceeding, brought prior to the adoption of §122.061, F. S., at the 1957 session of the legislature, held hospital districts not within the purview of Ch. 122, F. S., or of the definition contained in §122.02(1), F. S.

"'County' is more specific and less elastic than 'district' which may be employed to designate an area greater or less than a county, and is not synonymous therewith, except as employed in some constitutional or statutory provision . . ." (20 C. J. S. 756, §1). Although districts (such as county commissioners, justice of the peace, etc.) may have reference to divisions of the counties, they may also refer to separate entities, such as drainage districts, hospital districts, etc. Note must be taken of the specific mention in said §122.02(1), F. S., of drainage districts and mosquito control districts as being within the definition of state and county officers and employees, without any specific mention of zoning and other type districts.

From the above statutes and authorities your question is answered in the negative, as a reading of the act clearly indicates an intention of creating a benefit for the district itself and not for the other areas of the county, although they may receive an indirect benefit. Therefore, the district is not an agency of the county, but an independent agency to provide specific services in a limited area.

058-259—September 3, 1958

TAXATION

CLERK'S FEE—TAX SALES CERTIFICATE—§§28.21, 28.22, 28.24, 194.01 AND 194.02, F. S.

To: *W. G. Ward, Attorney for Clerk of Circuit Court, Dade County, Miami*

QUESTIONS:

1. Where there has been an initial purchase of a multiple number of tax sales certificates by a private individual at the time of the tax sale, and said owner wishes to make an assignment thereof by number and description on one or more pages, what is the duty of the clerk as to marginal notation on the tax sales certificate book?

2. What amount is he permitted to charge for each marginal notation in the tax sale certificate book?

As both questions relate to the same subject matter, they will be discussed together.

By A. G. O. 058-171, dated May 29, 1958, this office held that the 50¢ fee charged by the clerk of the circuit court in connection with the transfer of tax sales certificates should be included in the amount necessary to redeem such transfer and is to be reimbursed to the certificate holder.

This office also held in A. G. O. 057-357, dated Nov. 15, 1957, that the clerk's fee for making the marginal notations of mortgage satisfactions required by §§28.21 and 28.22, F. S., is 50¢ for each such notation in excess of one, the fee for the first such notation being included in the fee for recording the satisfaction. For marginal notations of mortgage satisfactions under §701.04, F. S., the fee should be 50¢. The reasoning in this last cited opinion would be applicable to the question presented here.

The clerk is required to keep a record in a book to be furnished by the comptroller (§194.25, F. S.) and to have a complete and full record of all sales and redemptions, including all pertinent information concerning the sale and transfer of tax certificates. The tax sales certificate issued to the county must be held by the clerk of the circuit court for redemption of sales (§194.01, F. S.), and any person owning or claiming any interest in the lands sold for taxes may redeem the same after sale and before tax deed is issued, by complying with §194.02, F. S., and the redemption is required to be entered by the clerk on the record of the tax sale on file in his office.

The clerk is entitled to compensation under §28.24, F. S., which provides, inter alia: "Filing any papers required to be filed, not otherwise provided for herein — .25."

It would appear from the above statutes and authorities that the clerk is required to record an assignment of multiple tax certificates and to make a marginal notation on each certificate transferred thereby. He is entitled to a fee in the amount of 25¢ for each transfer in excess of one, as well as to his statutory fee on the recording of the transfer. The first marginal notation would be included in the fee for the recording of the assignment.

058-262—September 3, 1958

CORPORATION OF BUSINESS TRUSTS

CONSTRUCTION OF §608.32, F. S., AS TO CERTAIN CORPORATIONS—§§608.03, 608.33, 608.38, F. S.

To: R. A. Gray, Secretary of State, Tallahassee

QUESTION:

Are railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative marketing associations, corporations not for profit and corporations paying the maximum capital stock tax required to make the annual report, required by §608.32, F. S., and name a resident agent for service of process?

Section 608.01, F. S., provides that the provisions of Ch. 608, F. S., "shall extend to all corporations whether chartered by special acts or general laws except that where special statutes for the regulation and control of types of business and corporations therein specified conflict herewith the provisions of such statutes shall control," to the extent of the conflict. Cooperative associations as well as railroad, canal, telephone and telegraph companies are incorporated under said Ch. 608 (see §608.03, F. S.); however, there may be some doubt as to the application of the chapter to agricultural cooperative marketing associations incorporated under and pursuant to Ch. 618, F. S., and nonprofit co-

operative associations under Ch. 619, F. S.

Under §608.38, F. S., *every corporation* is required to "maintain an office in this state with a resident agent thereat upon whom process may be served. The resident agent may be either an individual or a corporation. The corporation shall keep the secretary of state informed of the current city, town or village and street address of said office together with the name of the resident agent." Under §608.33, F. S., "every corporation, except railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative marketing associations and corporations and corporations not for profit, doing business in this state," are required to pay the capital stock taxes imposed by said section. Under §608.32, F. S., "all corporations heretofore or hereafter incorporated in this state, and all foreign corporations heretofore or hereafter authorized to do business in this state, are required to file with the secretary of state, on or before July 1 of each year, a sworn report, on such form as the secretary of state shall prescribe," stating in detail the information required by said section, including "the name and address of the resident agent upon whom service of process may be made . . ." However, railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative associations, corporations not for profit and corporations paying the maximum capital stock tax are required to furnish *only* the information required under said §608.32(1)(a)-(f).

The above extracts from Ch. 608, F. S., seem to show an intent on the part of the legislature that "every corporation," including those set out in the preceding paragraph hereof, doing business in this state "maintain an office in this state with a resident agent thereat upon whom process may be served," and file with the secretary of state a report giving the information required by said §608.32, F. S., including the "name and address of the resident agent upon whom service of process may be made." Although said Ch. 608, F. S., relates primarily to business corporations certain provisions therein, including §608.32, specifically include cooperative associations, corporations not for profit and corporations paying the maximum capital stock tax. These observations seem to answer the above stated question, unless the context of said Ch. 608 is limited by the title of Ch. 28170, from which said Ch. 608 was derived, and the fact that said chapter 28170 appears to have been designed primarily as a consolidation and revision of Chs. 610, 611 and 612, F. S., primarily business corporations. Doubtless the context of said Ch. 28170 was limited by its title by reason of which its application may have been limited to business corporations.

The fact that the context of an act of the legislature may be limited by its title does not likewise limit a codification of the said act (*Brewer v. Gay*, Fla., 86 So. 2d 799, text 804; *Rodriguez v. Jones*, Fla., 64 So. 2d 278, text 280 and 281; *Thompson v. Inter-County Tel. and Tel. Co.*, Fla., 62 So. 2d 16, text 18; *Hallendale v. Broward County Kennel Club*, 152 Fla. 266, 10 So. 2d 810; *McConville v. Ft. Pierce Bank and Trust Company*, 101 Fla. 727, 135 So. 392, text 394; *Henderson-Waits Lumber Co. v. Croft*, 89 Fla. 119, 103 So. 414, text 415; *Carlton v. State*, 63 Fla. 1, 58 So. 486, text 488; *Christopher v. Mungen*, 61 Fla. 534, 55 So. 273,

text 280). The question whether the title to an act was broad enough to cover some of its provisions is of no moment when such provisions were subsequently embodied in a statute duly enacted (*Carlton v. State*, 63 Fla. 1, 58 So. 486, 3rd headnote). Chapter 608, F. S., and not Ch. 28170, is now the law.

We, therefore, hold that railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative marketing associations, corporations not for profit, and corporations paying the maximum capital stock tax, are required to file the annual report required by §608.32, F. S., and give the information required under paragraphs (a) through (f) of subsection (1) of said section, but are not required to give the information required under paragraphs (g) through (j) of said subsection. The fact that paragraph (c) of said subsection (1) requires that "all corporations" include in their report "(c) the name and address of the resident agent upon whom service of process may be made," seems to place the above mentioned corporations within the purview of §608.38, F. S., and require that they appoint resident agents for purposes of service of process against such corporations. It is evident that the legislature intended to facilitate service of process upon corporations in this state.

058-264—September 8, 1958

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX—ACCOUNTS RECEIVABLE ON CONTRACTS—§§192.01, 199.07, AND CH. 199, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*
QUESTION:

Are the accounts receivable due a subcontractor from a general contractor, which represent an amount due on a cost plus subcontract from the U. S. government, subject to assessment as intangible personal property?

Under §192.01, F. S., unless exempted from taxation, all property in this state and all personal property belonging to persons residing in this state are declared to be subject to taxation in this state. Under §199.07, F. S., it is made the duty of owners of intangible personal property subject to taxation in this state to make return thereof to the proper tax assessor. Under these statutes "all personal property, tangible and intangible, that may legally have a taxing situs in this state" is subject to taxation. (*Wood v. Ford*, 148 Fla. 66, 3 So. 2d 490, text 493-4). "Intangible personal property is taxable at the domicile of its owner, except where such intangible personal property has by its use or otherwise acquired a business situs for taxation purposes at another place" (*Wood v. Ford*, *supra*, So. text 496). "The taxpayer who is domiciled in one state, but carries on business in another, is subject to a tax there measured by the value of the intangibles used in his business . . . (quoted with approval in *Smith v. Lummus*, 149 Fla. 660, 153 Fla. 415, 6 So. 2d 625, text 628, 14 So. 2d 897). . . . But taxation of a corporation by a state where it does business, measured by the value of the intangibles

used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles" (*Curry v. McCannless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162).

In the case of *Crane Co. v. Des Moines*, 208 Iowa 164, 225 N. W. 344, 76 A. L. R. 801, text 804, the court said that "the term 'business situs' while of modern origin, would seem to mean what the word indicates; that is, a situs in a place other than the domicile of the owner, where such owner, through an agent, manager or the like, is conducting a business out of which credits or open accounts grow and are used as a part of the business of the agency." In this connection the said court further stated that such business situs was not created by a mere temporary or transitory presence of the intangibles in a state, or by isolated transactions, but that there "must be 'something like a general, or more or less continuous course of business or series of transactions within the state where the property is physically located, as distinguished from mere sporadic or isolated transactions.'" (See also annotation in 76 A. L. R. 808.) The term "business situs" is not satisfied by the mere presence in the state of intangibles for safekeeping, or the custody of someone acting in a pure clerical capacity, or custody for the purpose of collection only, or similar purposes (annotation in 76 A. L. R. 812-16). The physical presence of the intangibles in question in this state is not always indispensable (annotation 76 A. L. R. 816).

Accounts receivable owned by taxpayers on the date of assessment for intangible personal property for the purpose of taxation have been held to be intangible personal property subject to assessment and taxation, under the provisions of Ch. 199, F. S., in cases where such accounts receivable represent repayment of money loaned by the taxpayer to a customer for the purchase of a commodity in which the taxpayer deals (*Smith v. Lummus*, *supra*).

It is a generally accepted principle of law of taxation that in the evaluation of credits or accounts receivable for the purpose of assessment and taxation as intangible personal property, a deduction of the bona fide indebtedness of a taxpayer from the amount of his taxable credits or accounts receivable is proper when and only when there is an applicable and effective statute so providing and authorizing such deduction. Ch. 199, F. S., contains no such provision nor any language from which such an intentment may be presumed. The same rule applies with regard to the assessment of intangible personal property as is applicable to the assessment for taxation of tangible personal property and real property (A. G. O. 054-235, dated Oct. 13, 1954, and reported in 1953-1954 biennial report of the attorney general at p. 254).

Accounts receivable are assets of any person due on open account for goods, wares or merchandise, labor or services furnished to the debtor under contract, express or implied, for the payment thereof. There is no legal basis for any distinction between open accounts due and to be paid for goods, wares and merchandise furnished by a merchant and open accounts due and to be paid for services rendered by an artisan or a person engaged in the practice of a profession (A. G. O. 053-301, dated Nov. 5, 1953, and reported in 1953-1954 biennial report of the attorney

general at p. 253).

In A. G. O. 053-121, dated June 8, 1953, and reported in the 1953-1954 Biennial Report of the Attorney General at p. 258, it was held that accounts receivable owing to a foreign corporation, authorized by permit to transact business in Florida, arising from business transactions consummated through its authorized operating plants located in Florida and accruing from the sale of products of the corporation to its customers in Florida and throughout the U. S. and foreign markets, are subject to intangible personal property tax imposed under the provisions of Ch. 199, F. S., where such sales and credits arising therefrom are subject to approval and acceptance by the corporation through its principal corporate office at the situs of its domicile.

A mortgage from an individual to the U. S. department of agriculture, farm security administration, was held to be subject to the intangible tax in A. G. O. 047-48, dated Feb. 18, 1947, and reported in the 1947-1948 biennial report of the attorney general at p. 243.

In A. G. O. 049-577, dated Dec. 2, 1949, and reported in the 1949-1950 biennial report of the attorney general at p. 249, it was held that the amount of money payable by the U. S. to a manufacturing corporation in reimbursement of advances made by the manufacturer for the account of the U. S. in connection with the fabrication and manufacture of supplies for the government was not taxable as intangible personal property in this state. It is urged that this decision is binding in the instant case. In light of the U. S. supreme court decision in the case of *Smith v. Davis*, 323 U. S. 111, 65 S. Ct. 157, 89 L. Ed. 107, we cannot agree with this conclusion. In that case in holding that an unsettled claim against the U. S. on open account which of itself would not bind the U. S. and which in no way increased or affected the public debt and, therefore, was not a credit instrumentality of the U. S. for the purpose of immunity from state and local taxation, the court said, *inter alia*, in these respects a mere open account claim differs vitally from the type of credit instrumentalities which this court in the past has recognized as constitutionally exempt from state and local taxation. Such instrumentalities in each instance have been characterized by (1) written documents, (2) the bearing of interest, (3) a binding promise by the U. S. to pay specified sums at specified dates and (4) specific congressional authorization which also pledges the faith and credit of the U. S. in support of the promise to pay.

It is clear, moreover, that the proposed taxation of this open account will not affect or embarrass in any substantial measure the power of the U. S. to secure credit or to secure aid from independent contractors for necessary military and civil construction projects. The tax here is a uniform, nondiscriminatory levy upon an unliquidated asset of the creditor and not upon a credit instrumentality of the U. S. That this asset involves a claim against the federal government is no more fatal to the validity of the tax than the fact that in *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, 114 A.L.R. 318, the tax was levied on the contractor's gross receipts from the U. S. or the fact that in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3, 62 S. Ct. 43, 140 A.L.R. 615, the sales tax was placed on the sale of property to a contractor for use in a federal government pro-

ject. The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned. They too must bear their fair share of the tax burden. And as long as that burden is nondiscriminatory, there is no basis for assuming that contractors will be any less willing to enter into construction contracts with the U. S. Nor is such a tax likely to affect or impair in any way their ability to discharge their duties efficiently. There is thus no practical reason for immunizing open accounts of this nature from taxation.

The file which is included with the request for opinion clearly shows that the facts come within the case cited above.

The comptroller of the state is charged with the duty of enforcement and interpretation of the statute involved and in light of the authorities above cited has ruled that the accounts receivable are taxable, and courts generally will not depart from such construction "except for the most cogent reasons, and unless clearly erroneous" (*Green v. Stuckey's of Fanning Springs, Inc.*, (1957) 99 So. 2d 867).

Your question is therefore answered in the affirmative, and A. G. O. 049-577 insofar as it conflicts with this opinion is withdrawn.

058-266—September 9, 1958

CRIMES

STATE LOTTERY LAWS—WHAT CONSTITUTES VIOLATION
—§23, Art. III, STATE CONST.

To: *William A. Hallowes, III, State Attorney, Fourth Judicial Circuit, Jacksonville*

STATEMENT OF FACT:

A television game entitled "Bingo at Home" is to be played by the home audience for merchandise prizes with the viewers using their own telephone numbers or parallel listings in a telephone directory, if no telephone is owned, as the basis of a self-constructed bingo card. Numbers are drawn at the station, and when a viewer has completed a bingo card, the game ends. Home viewers must send a postcard with the telephone number used, the name of the person owning that number and their own name and address, and winners are awarded advertised products, such being donated in return for mentioning the name of the product on the program.

QUESTION:

Does the conduct of the TV program described in the above statement of fact constitute a violation of the state lottery laws?

It is my opinion that the above described operation does not constitute an illegal lottery. Section 23, Art. III, State Const., prohibits lotteries in Florida; and it is well established that there are three basic elements of a lottery, to wit: (1) a prize; (2) an award by chance; and (3) a consideration. It is perfectly clear that the above outlined scheme contains the first two elements of a lottery, namely, a prize distributed by chance. However, a minute analysis fails to reveal that adequate consideration is present in the proposal.

The consideration possible is not any payment of something of value, or substantial inconvenience by the participant, but is most speculative at best. The program *might* attract more viewers to the station, thereby increasing its "Hooper" or similarly situated rating to warrant higher payment for advertising on said channel. The donating manufacturers might reap the benefits of having their products advertised at little cost to them. But, nowhere is there any tangible payment by the player of anything of value to the station, the sponsors or the donating manufacturers in consideration for the privilege of participating in the game. Nor, can the station obtain lists of named individuals for advertisers to utilize in the future, since only the single winner submits a card.

There appears to be no substantial consideration as defined by *Dorman v. Publix-Saenger-Sparks-Theatres*, 135 Fla. 284, 184 So. 886, in that nothing valuable flows from the viewer to the station, nor does he truly suffer any prejudice or inconvenience as a result of participating. As outlined in that decision, in order to constitute a lottery, there must be a hazard of something tangible of value paid or agreed to be paid by the player in consideration for the privilege of participating in the scheme or game. Nowhere in the present program does anything of value flow to the station nor is there any payment of something of value for the opportunity to participate.

This conclusion is readily distinguishable from that found in my earlier opinion 054-213, dated Sept. 9, 1954, in that no expenditure of time or effort is necessary in the present proposal to go to the places of business of sponsors to obtain entry blanks, nor can a ready mailing list of prospective customers be furnished by the entry of the sole winning card.

The only substantial effort required for participation is watching and listening to the program, which was deemed insufficient in *F. C. C. v. A. B. C.*, 347 U. S. 284, 98 L. ed. 699, 74 S. Ct. 593, upon careful analysis. To like effect is the holding of the supreme court of Alabama in *Clark v. State*, 80 So. 2d 312, wherein it was held under somewhat more violative circumstances than to be found in the situation which you outlined, that the consideration was insufficient to label a television program a lottery in that the main purpose was to have viewers watch the program and advertise the sponsoring store.

In view of the lack of any substantial consideration, it would appear that the program does not constitute a prohibited lottery.

058-267—September 10, 1958

CRIMES

MARATHONS; ENDURANCE CONTESTS PROHIBITED— CONSTRUCTION OF §785.04, F. S.—OCALA RADIO BROADCAST DISC JOCKEY MARATHON

To: K. C. Alvarez, Chief of Police, Ocala

STATEMENT OF FACT:

An employee of a local radio station is attempting to top a previous record of 7 days, 7 hours, 7 minutes, and 7 seconds for continuous broadcasting, by attaining an objective of 8 days, 8 hours, 8 minutes and 8 seconds. The official name given this contest is 'Radio Broadcast

Disc Jockey Marathon' and is being conducted in a display window of a department store in Ocala.

QUESTION:

Is the preceding described radio program in violation of §785.04, F. S.?

The pertinent part of §785.04, F. S., reads as follows:

785.04 Endurance contests prohibited.—No person shall maintain, operate, promote, conduct, or advertise, or aid in maintaining, operating, promoting, conducting, or advertising, or participate in any "marathon," "marathon dance," "walkathon," "skatathon," "bikathon," or any other mental or physical endurance contest or performance of a like or similar character or nature under any name whatsoever; provided, that this section shall not apply to bona fide athletic contests commonly known as cross-country races or marathon races held on extended outdoor cross-country courses over a limited number of miles.

Obviously the performance described by you is not a "marathon dance," "walkathon," "skatathon" or "bikathon" because it does not involve dancing, walking, skating or bicycling.

Is said performance a "marathon"? Webster's new international dictionary, 2nd edition, unabridged, defines "marathon" as follows: "A marathon race; also, a similar endurance contest, as in dancing." The performance described in your letter is not a marathon race. Nor do I think that it is a "similar endurance contest" because there is only one participant while a marathon race or, for that matter, any other kind of contest, has two or more participants or contestants. Therefore, in my opinion the performance about which you wrote is not a "marathon."

Does the performance with which you are concerned fall within the words, "or any other mental or physical contest or performance of a like or similar character or nature"? I think not. Its character or nature is not like or similar to the character or nature of a "marathon," "marathon dance," "walkathon," "skatathon" or "bikathon" because each of these performances involves a number of participants striving against each other for victory, while the performance about which you wrote is put on by only one person who is not competing against anyone; he is merely trying to break a record previously set by someone.

Therefore, it is my opinion that the said performance does not violate §785.04, F. S.

058-268—September 11, 1958

CORPORATIONS AND BUSINESS TRUSTS

ORGANIZATION OF SMALL BUSINESS INVESTMENT COMPANIES IN FLORIDA UNDER FEDERAL ACT (PUBLIC LAW 85-699)—Chs. 517, 608, 658-661; §§654.24 and 659.20, F. S.

To: Elmer E. Cummins, Small Business Administration, Atlanta, Ga.

QUESTION:

May a Florida small business investment company, as contemplated by the federal small business investment act of 1958, be chartered under Florida law for operation in accordance with the act?

Small business investment companies contemplated by the said small business investment act of 1958 (Public Law 85-699), are those patterned along the lines pioneered by the state of Maine and since followed by other New England states, and maybe elsewhere, in the formation of so-called development credit corporations. This type of corporation originated in Maine and was soon adopted by other New England states and may be available in other states.

In an article concerning such corporations published in the March 1955 New York State Commerce Review, we find the statement that "the development credit corporation pools loan funds advanced by financial institutions which choose to become members" and raised by the sale of stock in such development credit corporations are for loans to industries. In the same article we find a statement that development credit corporations raise "funds principally through loans to it by member financial institutions, supplemented by the sale of stock, while the (industrial) foundation secures funds from the sale of stock to and contributions from local residents" See also the article entitled "The Development Credit Corporations" in the June issue of State Government. We have also read the pamphlet "printed for the use of the Select Committee on Small Business of the House of Representatives, Eighty-fifth Congress, Second Session" from which it appears that the act in question is considered as "a new approach to helping small business find a solution to one of its most pressing problems—the problem of obtaining adequate financing," where at present the "principal short-comings are in the fields of capital—risk capital and long-term debt capital."

The small business investment companies, contemplated by the federal act, bear a close relation to the development credit corporations contemplated by Ch. 29776, 1955, *which act was repealed by Ch. 31388, 1956*. There has been no enactment by Florida of any act similar to said Ch. 29776. The said Florida act provided exemptions from the Florida securities laws for securities issued under the Florida act. The federal act provides exemptions from the federal securities statutes, as well as from the trust indenture act of 1939 and the investment company act of 1940. These exemptions appear to have been deemed necessary for a satisfactory operation of the said acts so that adequate risk capital might be obtained.

Although corporations might be organized and incorporated under the corporate laws of Florida (Ch. 608, F. S.) their operations in the financial field (such as the sale of their stock, the issuance of securities for sale to the public, etc.) will be subject to our sale of securities statutes (Ch. 517, F. S.), and maybe the Florida banking statutes (Chs. 658-661, F. S.) and other regulatory statutes. The authority of state banks to invest funds in such corporations is doubted (see §§654.24 and 659.20, F. S.).

Although a corporation may be organized under the corporate laws of Florida for the financing of small businesses, such a corporation would be limited as to stock and securities issued by it, and maybe as to investments made by it, to a greater extent than would small business investment corporations organized and *incorporated under the federal small business investment act of 1958*. This leads to a negative answer to the above question if we contemplate a state corporation with powers and exemptions comparable to the

powers and exemptions of the small business investment companies contemplated by the said small business investment act of 1958.

Supplement to

058-268—October 10, 1958

CORPORATIONS AND BUSINESS TRUSTS

ORGANIZATION OF SMALL BUSINESS INVESTMENT COMPANIES IN FLORIDA UNDER FEDERAL ACT (PUBLIC LAW 85-699)—Chs. 517, 608 and 658-661, F. S.

To: Elmer E. Cummins, Small Business Administration, Atlanta, Ga.

QUESTION:

May a Florida small business investment company, as contemplated by the federal small business investment act of 1958, be chartered under Florida law for operation in accordance with the act?

Our opinion to you under date of Sept. 11, 1958, (058-268), did not intend to hold and did not hold that a small business investment company could not be organized and incorporated under Ch. 608, F. S.; in fact, we stated in the said opinion that such a "corporation may be organized under the corporate laws of Florida," and implied that such a corporation might operate in this state so long as it complied with our securities (Ch. 517, F. S.) and banking (Chs. 658-661, F. S.) statutes. There is no legal objection to an investment corporation being organized and incorporated:

(a) To operate as a small business investment company under the small business investment act of 1958 (Public Law 85-699 of the 85th congress);

(b) To provide long term loans and equity capital to small business concerns;

(c) To acquire, hold, operate, and dispose of any property (real, personal or mixed) whenever necessary or appropriate to the carrying out of its lawful functions;

(d) To act as a depository or fiscal agent of the U. S. when so designated by the secretary of the treasury;

(e) To loan money on real or personal property, personal collateral, notes, bonds, debentures, securities, and to guarantee the payment or repayment of notes, bonds, debentures, or other securities;

(f) To buy, sell, and otherwise deal in notes, bonds, debentures, conditional sales, contracts, mortgages, deeds of trust, and other obligations of any corporation, company, partnership entity, or person, secured by real or personal property, stocks, bonds, or securities, or any interest therein;

(g) To carry on any other business, manufacturing or otherwise, when in the discretion of the board of directors, such action is necessary to effectuate the purposes of the corporation,

so long as its operations do not violate Florida's statutes relating to securities (Ch. 517, F. S.) and banking (Chs. 658-661, F. S.) and any other applicable statutes.

058-269—September 11, 1958

REGULATION OF VOCATIONS AND PROFESSIONS

STATE BOARD OF CHIROPRACTIC EXAMINERS—QUALIFICATION OF APPLICANT FOR LICENSE, U. S. CITIZENSHIP—§§460.06 and 460.07, F. S.

To: *Daniel K. Kirk, Secretary, Board of Chiropractic Examiners, Jacksonville*

QUESTION:

Does the Florida state board of chiropractic examiners have the authority to waive the statutory requirement that an applicant for licensure under Ch. 460, F. S., be a citizen of the U. S.?

Section 460.07, F. S., as amended by Ch. 57-215, relating to qualifications of applicants to practice chiropractic, provides, among other things, that "each applicant shall be a citizen of the United States . . ."

Section 460.06, F. S., relating to the powers and duties of the board, provides, among other things, that the Florida state board of chiropractic examiners shall have the power to make rules and regulations *not inconsistent* with the provisions of Ch. 460, F. S.

There appears to be nothing in the statute creating and regulating the Florida state board of chiropractic examiners that gives the said board the authority to waive this requirement. (See A. G. O. 049-53 relating to the Florida state board of massage where a similar conclusion was reached; 1949-1950 Biennial Report, p. 463.)

Your question is answered in the negative.

058-270—September 15, 1958

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS—CONSTRUCTION OF §317.20, F. S., IN CONNECTION WITH THE USE OF BENZEDRINE—§398.02, F. S.

To: *A. Max Brewer, Brevard County Prosecuting Attorney, Titusville*

QUESTION:

Are the provisions of §317.20, F. S., intended to include a driver whose normal faculties are impaired through the use of benzedrine?

You will note that the word "drugs" mentioned in the statute is restricted to "narcotic drugs."

While the term "narcotic drugs" is not defined by §317.20, F. S., we do find a definition of same under §398.02, F. S., our uniform narcotic drug act. The drugs defined as "narcotic" therein do not include benzedrine, nor is benzedrine a derivative of any of the drugs enumerated therein. I am not unmindful that the definitions contained in §398.02 relate specifically to the drugs affected by our uniform narcotic drug act, and that no specific relationship is shown to exist between the drugs enumerated therein to the "narcotic drugs" contained in §317.20. However, the drugs specified in §398.02 as being "narcotic" should shed considerable light upon the intention of the legislature as to what drugs are to be considered "narcotic" within the purview of §317.20.

Benzedrine is a trade mark name for amphetamine, which is a central nervous system stimulant. According to Dr. Vincent

Stewart, director of the Florida state food and drug laboratory, benzedrine is not a narcotic drug. The effect of this agent upon the nervous system is actually the antithesis of the effect of a narcotic.

While we do not take issue with the proposition that a person may consume a sufficient quantity of benzedrine to impair his normal faculties, the fundamental rule remains that criminal laws are to be strictly construed, and in this light, your question as phrased above, is answered in the negative.

058-271—September 16, 1958

CRIMINAL PROCEDURE

ARRESTS, AUTHORITY OF OFFICER TO SUMMON ASSISTANCE—CONSTRUCTION OF §901.18, F. S., AND BURDEN OF PROOF RULE OF LAW

To: Francis J. McCoy, Sergeant of Police, Detective Bureau, Orlando

QUESTIONS:

1. Does a police officer have the right to commandeer a passing motorist to aid in pursuing a person committing a misdemeanor?

2. Does the rule of law that the burden of proof is on the prosecution mean that a defendant does not have to prove his own allegations?

3. Is a city ordinance which makes it an offense for a person to tear up a "tag" placed on his automobile in conflict with any state statute?

4. Are people under tension eager to talk?

AS TO QUESTION 1:

Section 901.18, F. S., provides as follows:

901.18 Officer may summon assistance.— Any officer making a lawful arrest may orally summon as many persons as he deems necessary to aid him in making the arrest. Every person when so requested by an officer shall aid him in making such arrest.

Also, without regard to statute, the law gives a peace officer the right to require the assistance of as many bystanders as may be necessary to enable him to perform his duty in making an arrest (6 C. J. S. 616-617, Arrest, §16; 4 Am. Jur. 79-80, Arrest, §129).

However, I do not think that the purpose of the law is to authorize a police officer to commandeer a passing motorist and his automobile every time the officer wishes to give chase to a person who has just committed or is committing an ordinary misdemeanor or violation of a city ordinance, as, for example, an ordinary traffic violation. In my opinion it would be unreasonable to construe the law as conferring such broad powers upon officers.

Nevertheless, when a misdemeanor is being committed which is endangering the lives and/or property of travelers or others, as when a drunk person is driving his automobile in such a reckless and dangerous manner as to imminently menace other motorists, I think that an officer is within his rights if he commandeers a passing motorist to help him overtake the offender so that the peril to the public can be terminated by arresting him.

If a motorist is required to assist in a situation of the sort dealt with in the preceding paragraph, the officer giving the commands should do so with due regard for the safety of the commanded motorist and should not require such motorist to drive in such fashion as to endanger himself and/or his vehicle or other persons and/or their vehicles.

AS TO QUESTION 2:

I take it that you meant by this question to inquire as to whether a defendant must prove an affirmative defense, such as insanity, duress or alibi. The law on this point is succinctly summed up as follows in 22 C. J. S. 886, Criminal Law, §573:

The accused never has the burden of proving his innocence. However, after a prima facie case of guilt has been made out, the burden of adducing evidence devolves on him. He has the burden of proving affirmative defenses; but after such proof has been adduced, the burden of establishing guilt beyond a reasonable doubt still rests on the prosecution.

AS TO QUESTION 3:

I know of no state statute which conflicts with a city ordinance making it an offense for a person to tear up a "tag" placed on his automobile. I express no opinion as to whether such an ordinance conflicts with the constitution, since the policy of this office is to refrain from giving opinions on such matters. Nothing I have said is to be taken as an intimation that I consider the ordinance unconstitutional.

AS TO QUESTION 4:

The question of whether persons under tension are eager to talk is not a legal question within my province to answer. I suggest that you might be able to obtain advice on this point by consulting the Florida sheriffs' bureau.

058-272—September 17, 1958

PUBLIC RECORDS

INSPECTION BY PUBLIC—REFUSAL TO ALLOW, PENALTY
—§§119.01 and 119.02, F. S.

To: *Homer Q. Kimbrell, Attorney at law, Miami*

QUESTION:

Are the county tax rolls open to inspection so long as the taxes shown thereon are not delinquent?

Your attention is respectfully directed to §§119.01 and 119.02, F. S., which are as follows:

119.01 Public records open to examination by citizens.

—All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.

119.02 Penalty.—Any official who shall violate the provisions of §119.01 shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding three months.

The above quoted statute might appear to be in conflict with §199.07, F. S., which provides inter alia:

Intangible personal property tax returns shall not be open to inspection except by the officers of the state and county whose duties require their examination thereof, or under an order of a court of competent jurisdiction requiring the same as relevant evidence. No officer examining such returns shall divulge their contents other than the total value and tax thereon, or make or permit to be made any copy or list therefrom.

A careful examination of the above statute reveals that it has reference to the tax returns and not to the tax rolls even though the tax rolls may be a reflection of the confidential information contained in the tax return. It should also be noted that the total value and the tax thereon is excluded from the exemption to the general rule that the public records are open to examination.

This office has heretofore ruled in an opinion dated May 25, 1937, and reported in 1937-38 Biennial Report of the Attorney General at p. 100, that the tax roll in the hands of the tax collector is a public record, and under what is now Ch. 119, F. S., may be inspected by any citizen, subject to reasonable rules and regulations, so long as the work of the public official is not unreasonably interrupted or impaired.

Also see *State ex rel Davidson v. Couch*, 115 Fla. 115, 155 So. 153, and *State ex rel Cummer v. Pace*, 115 Fla. 468, 159 So. 679. Your attention is also directed to the case of *Fuller v. State ex rel O'Donnell*, 154 Fla. 368, 17 So. 2d 607, which holds that the statutory right of "inspection" of municipal records includes the right to make copies thereof.

From the above statutory authorities, your question is respectfully answered in the affirmative.

058-275—September 18, 1958

PUBLIC LANDS & PROPERTY

OCHLOCKONEE BAY AND RIVER SUBMERGED LANDS WITHIN BOUNDARY OF FORBES PURCHASE

To: *Van H. Ferguson, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTION:

Did the Forbes purchase include the submerged lands of the Ochlockonee bay and river, or did this land remain in governmental control and pass to the state by virtue of its sovereignty in 1845?

During the period from 1783 until 1821 the provinces of East and West Florida were under the dominion of the Spanish government. The dividing line between these provinces was the river Apalachicola. While the king of Spain had dominion of all the lands in Florida, it was the crown's policy, as had been true with the English government before it (1763-1783), to reserve for the Indian inhabitants a right to exclusive possession of certain lands, subject only to the dominion of the king. The lands within the Forbes purchase were so possessed by the Creek and Seminole Indians.

The House of Panton Leslie and Co., later succeeded by the House of John Forbes and Co., was principally a mercantile business which had been granted an exclusive license by the Spanish government to deal with Indians and traders in the area.

Because of debts for goods sold to them and robberies committed on two occasions by them, the Indians had become deeply indebted to the mercantile house by the turn of the 19th century. The Indians had no means of liquidating the debts other than by a concession of a portion of the lands which they possessed. Thus in 1804 the Indians by cession granted to the House of Panton Leslie & Co. a large tract of land between the Apalachicola and Wakulla rivers. This grant was confirmed by the Spanish governor of West Florida in 1806. Later, in 1811, two other cessions by the Indians were confirmed to the House of John Forbes & Co. and John Forbes individually, which extend the lands granted to include lands five miles west of the Apalachicola River, additional lands to the north of the original grant, the land from the Wakulla to the St. Marks river on the east and St. Vincent's island to the south. These three specific concessions composed the Forbes purchase which not only embraced an extensive portion of mainland but also all islands within four leagues to the south.

In the case of *Mitchell v. U. S.*, 34 U. S. 711, 9 Pet. 711, 9 L. Ed. 283, the U. S. ratified the above concessions and subsequently patents were issued. The U. S. did, however, except from the lands an area upon which the fort of St. Marks was located.

In order to answer your question, I have not only reviewed the applicable case law, the records available in the land office and the supreme court library, but I have also obtained from the archives a portion of the original records from the case of *Mitchell v. U. S.*, supra. These records show the Spanish government authorized the concessions not only to repay the mercantile house, but also for the underlining purpose of making available to industrious settlers cultivable land, it being understood that the Indians possessed the best agricultural lands in the Floridas. Thus the purpose of the Forbes purchase was to make available lands for settlers and to indemnify the mercantile house.

While it is true the Ochlockonee river and bay were crossed in the description of the first concession of 1804, and the grant was confirmed by Spain and ratified by the U. S., the court in the *Mitchell* case stated they were not passing on the boundaries or particular designation of the lines and point of the lands, for this was not in controversy in that suit. Thus, the U. S. merely ratified the specific grant without going into the area covered, except insofar as the fort of St. Marks was concerned.

The question of the boundaries was directly before the supreme court of Florida insofar as the waters between the mainland and St. Vincent's island were concerned in the case of *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505. I feel the law of that case is controlling here, and I will review it extensively in this opinion.

The Apalachicola Land and Development Co. as successors in title of John Forbes and Co., sought to prevent the state from leasing the submerged lands between St. Vincent's island and the mainland for planting and cultivating oysters. The plaintiff's claim was that the submerged lands in question were included in the cession from the Indians, and Florida had acquired no title to such submerged lands by virtue of its sovereignty. The supreme court in a well documented opinion held these submerged lands were not included in the cessions and did pass to the state in 1845 by virtue of its sovereignty.

In that case the court held the Indians could make no grant

or cession of land except by the dominant authority of Spain. Under the Spanish law private ownership extended only to the ordinary highwater mark on navigable bodies of water and a conveyance of lands below this mark could be consummated only by a clear showing of sovereign intent.

The court said at p. 517 of its opinion in the *McRae* case:

Since under the Spanish law, as well as under the law of this state, private ownership of uplands stops at high-water mark on navigable waters, except perhaps under special and particular provisions and action of sovereign governmental authority, those claiming ownership below high-water mark must show the sources and muniments of title from competent authority to make such a grant against the rights of the public in the shores of navigable waters in this state. See *Sullivan v. Richardson*, 33 Fla. 1, 14 South. 692; *Mayor and Aldermen of City of Mobile v. Enslava*, 9 Port (Ala.) 577, 33 Am. Dec. 325; *Mobile v. Enslava*, 16 Pet. (U. S.) 234, 10 L. Ed. 948; *Brickell v. Trammel*, *supra*.

The court said submerged lands are not included . . . "even if the exterior boundary lines of the lands, which are on both sides of a navigable tide water bay of the sea, run across the bay in reaching the land on the opposite side to be delineated as a part of the concession." This is precisely the situation which you present. The description of the concession of 1804 crossed the Ochlockonee river both at the north and south. The survey made by the surveyor general subsequent to the *Mitchell* case, *supra*, likewise crossed the Ochlockonee bay. However, the crossing was for the purpose of establishing the exterior boundaries of the upland which had been granted.

The supreme court in the *McRae* case recognized that the primary purpose of the *Forbes* purchase was to provide lands for white settlers' cultivation and settlement. In this respect the court stated at p. 520 of its opinion:

Concessions to private ownership of submerged lands under navigable tide waters, that would curtail or exclude the use by the public and by riparian owner of the navigable waters and the lands thereunder adjacent to the uplands, would hamper or prevent rather than encourage the settlement and cultivation of the lands intended to be granted for cultivation.

It is also interesting to note the grants or concessions were confirmed for the Spanish government by the governor of West Florida. The supreme court in the *Mitchell* case, while saying the governor had the right to confirm grants of lands possessed by the Indians, said the right to grant royal lands had been transferred to the intendant. Under Spanish law, lands owned by Spain in the "new world" were divided into provinces, and each province had an intendant. The intendant, a high ranking Spanish official, controlled four branches of the government which included justice, police, treasury and war (White, Spanish Law, p. 56), and he was given specific control over royal lands within his province. (White, *Supra*.) The intendency for the districts of East and West Florida was located in Cuba and the governors of both districts were sub-delegates of and subordinate to the intendency (White, Spanish Law. p. 54, 157). In the *McRae* case at p. 523, the court said:

Under the law of Spain at that time grants could not be made of submerged lands below high-water mark, except by the king or by express authority of the king; and the cession to John Forbes & Co. was not made by the king or by any one expressly authorized by the king to grant submerged lands; and a cession of submerged lands under navigable waters was contrary to the laws of Spain in force in West Florida at the time the cession was made. . . The court further said on the same page:

Even though there is included within the lines as run or "within the boundaries of the grant," submerged lands, i.e., lands below ordinary high-water mark or navigable waters of the bay or tide lands, yet such lands, being held for purposes common to the public, were "not intended to be conveyed" or granted by the cession, any more than were the fort of St. Marks "and land attached to it by military usage," as in *Mitchell v. United States*, 15 Pet. (U. S.) 52, 91 (10 L. Ed. 658).

The purpose of the original concession was to convey upland. There was no intent to convey the submerged lands in question, and no authority for such conveyance had it been intended. The line run by the Indians, confirmed by the Spanish government and ratified by the U. S. was the exterior boundary of the uplands conveyed. It was not a conveyance of the submerged lands under navigable waters included within such boundaries.

Under the above authority, I am of the opinion the submerged lands under the Ochlockonee river and bay were not included in the Forbes purchase, and thus passed to Florida in 1845 by virtue of its sovereignty.

Your question is answered accordingly.

058-276—September 18, 1958

CRIMES

OBSCENE LITERATURE; POSSESSION, PUBLICATION, DISTRIBUTION OR EXHIBITION TO MINOR CHILD —INJUNCTION TO PREVENT VIOLATION OF §847.01 (1)-§847.01 (7), F. S.

To: *Quentin V. Long, Assistant State Attorney, Fort Lauderdale*
QUESTION:

Under what circumstances may a prosecuting officer seek the injunctive powers of the courts to prevent a threatened violation of §847.01, F. S., prohibiting possessing, publishing or distributing obscene literature, or exhibiting such literature to a minor child?

Section 847.01, F. S., specifically prohibits certain activity relating to obscene literature and provides that prosecuting officers may call upon the injunctive powers of the courts to prevent a "threatened violation of this section." The question quite naturally follows as to what a "threatened violation" means in terms of the legislative intent.

The supreme court of Florida in *Zetrouer v. Zetrouer*, 89 Fla. 253, 103 So. 625, recognized that a prohibitive or preventive injunction is one that operates to restrain the commission of an act and prevent a threatened injury. Such appears to be the type authorized by §847.01(7) F. S., and the intent of the

statute in granting a prosecutor the power to seek injunctive restraint clearly indicates that such may be done whenever necessary to prevent a threatened violation of the statute.

The words "threatened violation" are in language of common usage and as such, should be construed in a plain and ordinary signification, and not in a technical sense, according to the rule found in *Gasson v. Gay*, 49 So. 2d 525, 21 A.L.R. 2d 412. The only meaning which reasonably can be placed on these terms is that when it becomes apparent to the prosecutor that a violation is about to occur, he may obtain injunctive relief by legislative authority. The plain and ordinary signification of "threatened violation," so evidenced by Webster's collegiate dictionary, 5th Ed., and other definitive authorities, is to the effect that the prosecutor must show some reasonable forewarning of a violation, as by an expression or sign of an intention to effect an act contrary to the statutory prohibition.

For example, if an advertisement appears to the effect that an indecent motion picture film will be displayed, such would authorize a prosecutor to seek injunctive relief for a threatened violation of the statute. Quite naturally, the right to such injunctive relief would be determined at the hearing before the court, wherein the court would evaluate and rule on the facts giving rise to the application.

To like effect, it would seem that under some circumstances an *actual* violation of the statute would warrant the use of injunctive relief, since the perpetration of the prohibited deed would provide a prosecutor reasonable forewarning of a continued violation. Using the above example where an indecent motion picture is advertised to be shown on five consecutive nights, then the actual showing of the film on the first night advertised would be reasonably convincing evidence of an intent to continue such prohibited activity as advertised. In such an instance, an arrest for the initial violation may or may not impose sufficient restriction upon the perpetrator to preclude the continued showing of the film as advertised. Should the threat remain, the injunctive powers would lie.

Perhaps the above will prove to be of some value to you.

058-277—September 19, 1958

CRIMINAL PROCEDURE

RESTORATION OF STOLEN PROPERTY TO RIGHTFUL OWNER—CONSTRUCTION OF §811.201, F. S.

To: Francis K. Whitaker, Acting County Solicitor, Orlando
QUESTIONS:

1. What procedure must be followed after trial, where defendant is found not guilty in a case of larceny of auto or money?
2. What procedure must be followed to return money or an auto to an owner if the defendant is found guilty?
3. What procedure must be followed to return some object other than money or an automobile to an alleged owner, (a) when defendant found guilty, (b) when defendant found not guilty, and defendant does not admit ownership to be in complaining state witness?

Section 811.201, F. S., sets out the circumstances under which and the manner in which the rightful owner of stolen money or a stolen motor vehicle may obtain possession thereof when the same is being held as evidence. The first paragraph of said section reads as follows:

811.201 Larceny; return of property to owner; procedure.— In every instance in which any money or motor vehicle shall have been taken from its rightful owner under circumstances constituting larceny of such money or motor vehicle *and such money or motor vehicle is being held by state, county or municipal officials as evidence*, the rightful owner of such money or motor vehicle may obtain the return and possession thereof in the following manner: (Emphasis supplied).

Then the statute goes on to authorize the rightful owner to file a petition in the court having criminal jurisdiction and to specify the procedure whereby such owner may obtain the stolen money or motor vehicle which is being held as evidence. Among other things, it provides that if objections are filed by any person claiming title other than the petitioner, the court may defer hearing the matter until after the criminal case is adjudicated; that when money or a motor vehicle is returned to its rightful owner the court shall direct the clerk to make a detailed inventory description thereof and that such inventory shall be admissible at any trial involving the larceny of such money or motor vehicle; and that if the defendant fails to object to the return of the money or motor vehicle to its rightful owner, that fact shall not be put in evidence at the trial of the defendant in the case.

It therefore appears that said statute was intended to enable the owner of stolen money or a stolen motor vehicle to apply for possession thereof while the same is still being held as evidence, that is to say, before the defendant is convicted or acquitted. I do not think that stolen property may properly be considered as being held as evidence in a case after a conviction or acquittal eliminates the need for evidence.

While it is true that said statute authorizes the judge of the criminal court, upon the filing of objections, to defer hearing the matter of restitution of the money or motor vehicle to the owner until after the criminal case has been adjudicated, such deferment must be based on the filing of a petition before the adjudication of the criminal case and while the money or motor vehicle is still being held as evidence.

The said statute specifies the procedure to be followed when the money or motor vehicle is still being held as evidence. I do not think that proceedings thereunder can be initiated after a conviction or acquittal. Nor does it ever apply to property other than money and motor vehicles.

However, I think that the court has inherent power to order allegedly stolen property restored to the owner after conviction of the thief or to the alleged thief after he is acquitted of the theft.

In Wharton's Criminal Law and Procedure, Vol. 5, pp. 382-383, §2190, we find the following statements:

In the absence of statute, the court before which the accused is found guilty has power to award a writ of restitution of the stolen property, or the proceeds thereof, to the person from whom the property was taken, or to

the owner, if the accused was found guilty by reason of the evidence given or procured by such person or owner. Under statutes in some jurisdictions, if the property stolen or embezzled has not already been delivered to the owner prior to the trial, "the court before which the trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner." Upon conviction or plea of guilty, the trial court may, it seems, proceed to determine the question of ownership in a summary way.

Both at common law and under modern statutes, the complainant may apply to the trial court for an order of restitution of the goods to him as owner thereof, when the accused is convicted or pleads guilty. The conviction or plea is sufficient evidence that the accused has no title to the property. Upon acquittal the court must presume that the property was not stolen. In the absence of statute, the accused, upon acquittal, is entitled to an order from the trial court that property taken from his possession and in custody of the court or its officer be restored to his possession.

The acquittal is not conclusive on the question of title, which may be tried elsewhere; but it is error for the trial court, without statute authority, to proceed to try the question of title before restoring possession when asked.

In Bishop's New Criminal Procedure, 2nd Ed., Vol. 1, p. 153, §211, appears the statement that if the arresting officer finds on the prisoner's person, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying proofs relating to the transaction, "he may take and hold them to be disposed of as the court directs." And on p. 154 of the same volume, §212, it is said that the officer "holds all, whether money or goods, subject to the order of the court; which in proper circumstances will direct him to restore the whole or a part to the prisoner. This power is exercised both in cases where the original taking was wrongful, and where for any other reason there ought to be a partial or complete returning of the thing."

In *Bruchal v. Smith* (Conn.), 146 A. 491, 492, it is said:

We have not, as have some states, a statute specifically subjecting property or money taken or detained as evidence in a criminal cause to the orders, as to disposition thereof, of the court before which the cause is brought or pending, but courts have *inherent* power to direct that such property be returned to the owner, delivered up on his order, or otherwise disposed of, when it is no longer required for the purposes of justice. (Emphasis supplied.)

The nearest thing to a Florida case in point which we find is *Jenkins v. State*, 41 So. 2d 554. In that case Jenkins was tried and acquitted on charges of breaking and entering and grand

larceny. The money taken from him upon his arrest was offered in evidence. Upon his acquittal he petitioned the court for the return of the money. The petition was denied and the money was ordered delivered to the chief of police. Jenkins appealed and a majority of the members of the supreme court joined in dismissing the appeal for lack of jurisdiction to entertain it. Three members of the court, including two who are still on the court, viz., Mr. Chief Justice Terrell and Mr. Justice Hobson, dissented from the order of dismissal. They thought that the appeal should be treated as a petition for certiorari under §59.45, F. S., and that the trial court's order should be quashed as erroneous. In reaching this conclusion, the three dissenting members of the court said in part:

When property is received in evidence by a trial court and the accused is acquitted, the trial court has *inherent power* to make proper disposition of the property. The question involved here is one of proper exercise of jurisdiction.

The Criminal Court was not called upon to try title. The petition for restitution was of possession. The money was taken from Jenkins by the arresting officer. Jenkins was tried and acquitted and he wants his possessory rights to the money which was taken from him honored by the court. No factors have been shown to preclude this.

The petition of Jenkins seems to have been well founded, and the order of February 4, 1949, denying the petition of Jenkins and awarding the money to the possession of the Chief of Police, should be quashed. (Emphasis supplied.)

It is noted that the dismissal of the appeal rendered it unnecessary for the four justices who concurred in such dismissal to express any opinion as to the inherent power of the trial court in such matters.

So, without regard to §811.201, F. S., it is my opinion that when an automobile or money or any other property is held as evidence in a larceny case the trial court has inherent power, upon the conviction of the defendant, to order the same restored to the owner from whom it was stolen; and that if the defendant is acquitted of the larceny charge, the court has inherent power to order such property restored to the acquitted defendant from whose possession it was taken. If the defendant is acquitted, I do not think that, in the absence of consent by him, the court can properly enter an order in the criminal case for the delivery of the property to the person from whom it was allegedly stolen. I express no opinion as to what civil remedy, if any, the alleged owner has in the event that the defendant is acquitted.

I do not think that it is necessary to follow any set form of procedure in order to obtain an order for delivery of the property to the owner when the defendant is convicted of stealing the same or to the alleged thief from whose possession it was taken when he is acquitted of the theft of the property. It is my opinion that in either instance the court may proceed in a summary way.

058-278—October 2, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
PAYMENT BY COUNTY OF TRAVEL EXPENSES OF CLERK
OF CIRCUIT COURT AND DEPUTIES TO MEETINGS OF
COUNTY FINANCE OFFICERS—§6(7), ART. V,
STATE CONST.**

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

May a board of county commissioners reimburse the clerk of the circuit court and designated deputy clerks their travel expenses in connection with their attendance at meetings of the Florida county finance officers association?

I am informed by your letter of inquiry that an association known as the Florida finance officers association has recently been organized. Said association apparently is sponsored by the county commissioners association and Florida county clerks association. Association membership is comprised of the clerks of the circuit courts who, as ex officio auditors of the county under the constitution (§6(7) Art. V), are charged with certain responsibilities in connection with county finance matters, and certain designated deputy clerks of the circuit courts who, in fact, actually perform the necessary bookkeeping services in connection with the administration of county finances.

An injunction to restrain payment of the expenses of representatives of the board of county commissioners in attending hearings held before the state road department outside their county was denied in the case of *Adams v. Lott*, 150 So. 596, 112 Fla. 49. The court pointed out that in the absence of charges and proof of facts tending to show fraud or abuse committed by the board or its committee under the guise of incurring an ostensibly authorized expenditure for a county purpose, that the injunction was properly denied.

In A. G. O. 054-92, I pointed out that the clerk of the circuit court's expenses in connection with his attendance at a county clerks association convention were properly charged to the clerk's office and that unless the clerk's travel was on *behalf of and under the direction of the board of county commissioners*, there was no authority by which such expenses could be paid by that board.

Similar problems are also considered in A. G. O. 056-178, 056-320, 056-323, and 058-89.

In A. G. O. 056-178 and 058-89, we pointed out that:

If the meeting is a mere social function, little, if any, benefit will flow to the county be reason of the attendance of county officers; other types of meetings may or may not be beneficial, depending on their nature and the problems studied and considered. We do not think that it follows as a matter of law that the attendance of county officers at such meetings is ipso facto beneficial to the county; but before such expenses may be paid from public funds, there must be a showing made by the officer, claiming expenses from public funds, of benefits flowing to the county by reason of his having attended such a meeting.

In connection with your inquiry, as in the aforementioned attorney general opinions, the ultimate tests as to whether the

expense of attending various meetings of county officer associations may properly be paid by the county, is whether a beneficial county purpose is served, as distinguished from some other purpose. Such determination is one to be made primarily by the exercise of sound discretion of the attending official, for he, better than any other, is familiar with the problems and duties considered as they relate to his particular county.

Inasmuch as the purpose of the county finance officers association to promote public interest in county finance matters and to secure uniform accounting records, reports, and financial practices in the several counties of the state serves a valid county purpose in that it contemplates a better understanding of and a more orderly and uniform program for the administration of county financial affairs, I am of the opinion that if the board of county commissioners deem it in the best interest of their county to send the clerk of the circuit court and his appropriate deputies to the association meetings as representatives of the county the board would be authorized to reimburse the clerk and deputies attending such meetings for reasonable travel expenses thereby incurred.

Your question is answered in the affirmative.

058-279—October 2, 1958

TAXATION

EXEMPTION OF PROPERTY OF CORPORATION USED FOR EDUCATIONAL PURPOSES—SUN DIAL SCHOOL—§16, ART. XVI AND §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the property owned by a corporation formed and operated for profit and leased to a nonprofit corporation for the purpose of maintaining a nonprofit school for mentally retarded children exempt from ad valorem taxes?

It seems appropriate first to review the organic law dealing with property exempt, or to be exempted (by the legislature) from taxation. Under §16, Art. XVI, State Const., property of all corporations is subject to taxation unless held and used exclusively for *educational*, and other purposes. It would seem that this portion of the constitution relates to corporate property and is a mandate operating without aid of legislative enactment. (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607) Section 1, Art. IX, State Const., although dealing with the same general subject, is in a different category because its provisions are not restricted to property of corporations and it obligates the legislative body to provide uniform taxation and secure just valuation of all property, "excepting such property as may be exempted" by law for educational and other purposes. Thus the legislature was empowered to specify certain exemptions, and this was done in §192.06(3), F. S., which provides "property of education . . . institutions . . . actually occupied and used by them for the purpose for which they have been . . . organized . . ." shall be exempt.

Summarizing, under §16, Art. XVI and under the statute authorized by §1 Art. IX, property devoted to education is relieved

of the tax burden, and it is noteworthy that the predominant word in these provisions is "use"; the utilization of the property is the criterion in determining its liability or nonliability for taxes (*Riverside Military Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870).

In the case of *State ex rel Cragor Co. v. Doss*, 150 Fla. 491, 8 So. 2d 17, §16 Art. XVI, State Const., was said to be designed to cover the property of certain corporations for profit which had been enjoying exemptions and said exemptions were limited to religious, educational and charitable purposes. The origin and reason for the said section of the constitution is found in *Palmer, et al v. Louisville and Nashville Railroad Co.*, 19 Fla. 231. This would indicate that the fact of ownership by a corporation for profit would not be necessarily fatal to its request for exemption from taxation.

The criterion for exemption from taxation is the character of use to which the property is put and not the character of ownership (*State v. Inter-American Center Authority* (1955, Fla.), 84 So. 2d 9).

Exemptions from taxation are granted by the sovereign only when and to the extent that it may be deemed to conserve the general welfare. Organic and statutory exemptions, being in the nature of special privileges or immunities, should be strictly construed in order to confine the exemptions within the limitations prescribed by the sovereign power (*Rast v. Hulvey*, 77 Fla. 74, 80 So. 750; *Amos v. Jacksonville Realty and Mortgage Co.*, 77 Fla. 403, 81 So. 524; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232).

The question as to the use of the property for educational purposes is a question of fact which must be determined by the tax assessor.

From the above statutes and authorities, we must conclude that your question be answered in the affirmative, if the tax assessor finds that the property is used exclusively for educational purposes.

058-280—October 3, 1958

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES — SITUS FOR TAXATION, ACCOUNTS, ETC.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the accounts receivable of the Fairchild Aircraft, a division of the Fairchild Engine and Airplane Corp., a Maryland corporation, qualified to transact business in Florida, subject to Florida's intangible personal property taxes, under the facts and circumstances hereinafter set out?

The Fairchild Engine and Airplane Corp., a Maryland corporation, maintains an aircraft overhaul plant and business in St. Johns county, Florida, which is operated by a division of the said corporation, operating under the title of Fairchild Aircraft. The said corporation qualified as a foreign corporation doing business in Florida on July 24, 1954, and is now so qualified. In its St. Johns county operations the corporation makes airplane repairs for both the U. S. and the Brazilian governments.

The repair work, for the U. S., Brazil, or other party, is performed subject to contract previously entered into between the corporation and the government or party for whom the work is performed. In this connection the following facts appear from the file before us:

(a) All these contracts and supplements thereto are negotiated, approved, and executed at Hagerstown. The St. Augustine plant has no authority whatever in this regard. No credit may be extended by the St. Augustine plant.

(b) No salesmen are employed at or work out of the St. Augustine plant or out of any other location in Florida.

(c) The St. Augustine plant's sole function is performing the actual airplane overhaul work that is the subject of all the contracts. There is no managerial discretion granted this plant, except as to the actual work, and even here the method is largely dictated by the home office.

(d) In the case of the Brazilian contract, all payments were made at Hagerstown. In the case of the U. S. government contracts, some billings are rendered by the St. Augustine plant, but payments are made either directly to Hagerstown or else received by St. Augustine and remitted immediately and directly to Hagerstown. Such funds are not commingled with the operating fund at St. Augustine.

(e) The only bank account in St. Augustine is utilized solely for payroll and other operating expenses, the funds being remitted from the Hagerstown home office.

(f) A portion of all receivables from both the U. S. and Brazil arose from time and material work. Under such a plan the final compensation for the repair work is not determined until the completion of the repair work.

(g) A portion of the receivables on January 1 of the tax year was subject to supplemental agreements or cost redetermination by the parties.

The judiciary of this state long ago recognized the general rule that personal property, including intangibles, has its taxable situs where its owner is domiciled (*Hunt v. Turner*, 54 Fla. 654, 45 So. 509; *Smith v. Lummus*, 149 Fla. 660, 6 So. 2d 625) subject to certain exceptions, including the acquisition of a "business situs" in another state (51 Am. Jur. 479, §468; 84 C. J. S. 234, §116). It is essential to the validity of a tax on intangibles that such intangibles be legally within the jurisdiction of the taxing state (*Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. ed. 1143). The domicile of the corporate owner in question being in another state for the intangibles in question to be subject to taxation in Florida they must have acquired a "business domicile" in this state. It would be hard, if not impossible, to formulate a general rule as to what constitutes a "business situs" for the purpose of taxing intangibles in a state other than that of the domicile of the owner, since such situs depends on various facts and combinations of facts (annotations in 76 A. L. R. 807 and 143 A. L. R. 365). The prime question is whether or not there has been a localization or integration of the intangibles in question within the Florida business activities of the Fairchild Engine and Airplane Corp., which in law is the essence of "business situs" for the purposes of taxation (*Gay v. Bessemer Prop.*, 159 Fla. 729, 32 So. 2d 587, text 591). Was the corporation's headquarters in another state the actual

seat of its overall business direction; did that office exercise complete control of the intangibles in question, or were they controlled from a business office in Florida? Is the operation of the business in Florida a separate operation operated as an entity in Florida, so that the Florida business, although an asset of the corporation, is in fact a separate operation?

It appears from the above statement of facts that the "St. Augustine plant's sole function is the performing of the actual airplane overhaul work that is the subject of all the contracts." It also appears from such facts that "there is no managerial direction granted this plant, except as to the actual work, and even there the method is largely dictated by the home office." All "contracts and supplements thereto are negotiated, approved and executed at" the corporation's home office in another state. No credits may be extended by the St. Augustine plant. It does not clearly appear that all accounts for work done are due and payable at the Maryland home office under the work contracts; however, it does appear that when payments are sent to the St. Johns county Florida, plant that they are transmitted to the home office. "Such funds are not commingled with the operating fund at St. Augustine."

If the facts and circumstances appearing from the file handed us with the request for opinion are to be accepted as true, correct and full and complete, then the above question must be answered in the negative. From the facts and circumstances before us the situs of the accounts receivable appears to be in another state.

058-281—October 3, 1958

TAXATION

DOCUMENTARY STAMP TAXES—NOTES AND OTHER OBLIGATIONS TO RURAL ELECTRIFICATION ADMINISTRATION —§§201.08 and 201.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are promissory notes from a telephone company to the rural electrification administration subject to the Florida documentary stamp taxing statutes?

2. Are promissory notes from an electric cooperative to the rural electrification administration subject to the said documentary stamp taxing statutes?

For the purposes of this opinion we shall presume that the telephone company is one organized and established under Ch. 608, F. S., or a like or similar statute of this or another state; and that the electric cooperative is one organized and established under Ch. 425, F. S., or a like or similar statute of this or another state.

Corporations organized under either Ch. 425 or 608, F. S., have full authority and power to borrow money and otherwise incur indebtedness and evidence the same by their promissory notes, bonds, or otherwise, and to secure the payment of the same by mortgages, liens, pledges or otherwise encumbering their property or any part or parcel thereof. Each appears to be public service corporations or agencies. Each appears to be within the purview of the federal rural electrification statutes (title 7, §§901, et seq., U. S. code,) and qualified to obtain loans

from the rural electrification administration under the terms and conditions of said statute and the rules of the administration.

Although we find numerous provisions in the federal statutes relating to taxation and tax exemptions, we find nothing in the statutes relative to the rural electrification administration, or rural electrification, expressly providing tax exemption for notes and mortgages or liens made payable to the said administration, in so far as the maker of such documents is concerned. Such documents in the hands of the federal government, or any of its agencies, are tax exempt in the absence of a federal statute authorizing or permitting their taxation in whole or in part. However, it does not follow that the maker of such documents is within the federal exemption. We find nothing in the federal statutes relative to rural electrification making the promissory note part and parcel of a mortgage securing it as does the federal land bank statutes (see our opinion 050-504).

Chapter 201, F. S., appears to levy an excise tax upon promissory notes and other written obligations to pay money (§201.08, F. S.,) made, signed, executed, or issued in this state (§201.01, F. S.). We find no state statute expressly exempting notes and other written obligations to pay money to the U. S. or any of its agencies from the operation of Ch. 201, F. S., when made, executed, signed or issued in this state. Promissory notes issued by either a telephone company or an electric cooperative are not expressly exempt from documentary stamp taxes by either the federal or Florida statutes. We hold that such promissory notes are subject to documentary stamp taxes, within the rule of *Plymouth Citrus Growers Assn. v. Lee*, Comptroller, 157 Fla. 893, 27 So. 2d 415, in the absence of some statute expressly exempting such documents from taxation, as against the makers thereof.

Although we hold in this opinion that promissory notes and other obligations to pay money made, signed, executed or issued in this state by telephone companies and electric cooperatives are subject to Ch. 201, F. S., in so far as the maker is concerned, there is no obligation on the part of the rural electrification administration or the federal government to pay in case the maker fails to pay. Collection may be made from the maker only. The federal agency is entitled to have the instruments recorded although the documentary stamp taxes may not have been paid prior to delivery to it. The state's remedy is against the maker, not the federal government.

058-282—October 3, 1958

TAXATION

CIGARETTE TAXES—PROCEDURE FOR RECOVERING TAXES DISTRIBUTED TO MUNICIPALITY THROUGH ERROR—

CH. 210; §§210.03, 210.09, 210.19 AND 210.20, F. S.

To: *Julian E. Ross, City Attorney, Fort Lauderdale*

QUESTION:

Where cigarette tax funds, levied and collected under and pursuant to Ch. 210, F. S., and especially §210.03 thereof, are, because of erroneous reports of retail dealers or errors of the state beverage department, paid to the wrong municipality, what procedure should be adopted to correct such error?

It appears from the request for opinion that the department, upon an audit of the records of a retail dealer in cigarettes, has found that due to errors in the reports of such dealer one municipality in this state has been given credit for cigarette sales made in another municipality and that the cigarette taxes due upon such cigarette sales have been paid to the wrong municipality. This error covers the period of time beginning Aug. 1, 1955, and ending April 30, 1958.

Cigarette taxes "when imposed by a municipality shall be advanced and paid by the dealer to the director, for deposit and distribution . . . upon the first sale or transaction within the state of cigarettes sold or to be sold at retail within the territorial limits of such municipality, irrespective of whether or not such sale or transfer be to the ultimate purchaser or consumer" (§210.03, F. S.). Retail dealers are required to make return of the number of packs of cigarettes sold by them, "showing the same is inside or outside of a qualified municipality, and if the same is made within the limits of a qualified municipality, the correct name of the municipality must be indicated" (§210.09, F. S.). From these reports the beverage department is required to maintain records "which shall disclose the amount of taxes collected for any municipality levying a tax . . ." (§210.19, F. S.). The department is required from these records to certify, from month to month, "to the comptroller the amount derived from each municipal tax" imposed (§210.20, F. S.) who makes distribution to such municipalities. We find no error chargeable to either the beverage department or the state comptroller. At most, we have the funds and moneys of one municipality being paid over to another through an error of a third person. One municipality has received the funds of another municipality through error.

In this state "it is settled that money paid under a mistake of fact may be so recovered, it being considered unconscionable that money so paid should be detained" on discovery of the mistake (*First State Bank of Fort Meade v. Singletary*, 124 Fla. 770, 169 So. 407, text 408; 58 C. J. S. 925, §16). As a general rule a cause of action against a municipal corporation may be enforced by an action in any form which would be appropriate in an action against a person, firm or corporation (64 C. J. S. 1032, §2189; annotation in 15 L. R. A. NS, 567). The fact that such moneys were received from a third person will not affect the liability to return or repay it (58 C. J. S. 924, §15). See also 4 Am. Jur. 514, §24. "An action for money had and received lies against a municipality to recover money collected by it which belongs in equity and good conscience to the plaintiff" (4 Am. Jur. 505, §17; 38 Am. Jur. 201, §521). It seems clear that one municipality receiving funds belonging to another municipality through error is required to pay such funds over to the municipality entitled thereto.

The requirements of §210.03, F. S., that cigarette tax moneys received thereunder by a municipality be used for the dual local and state purposes therein mentioned, would not seem to authorize the retention of such moneys when received through error as above; or cancel or avoid the obligation of the municipality receiving same to repay same as above.

Although difficulties may arise by reason of the procedure outlined by the beverage department for refunding such sums to the municipality entitled thereto, the municipality not being

entitled thereto legally suffers no legal injury. Whether or not there may be a pledge of current and future cigarette tax moneys which, under the contract clauses of the state and federal constitutions, would require their payment to the said municipality, notwithstanding its obligation to repay the funds erroneously received, has not been considered; so far as we are advised such question may not be involved.

So long as no constitutional or statutory obligations will be violated by the procedure outlined by the beverage department we see no reason why it may not be followed and carried out. In case it should appear that such a procedure on the part of the beverage department would violate some statute or the constitutional rights of third parties, then the remedy of the municipality would seem to be a suit for recovery.

This seems to answer the above question as well as it may now be answered, without determining constitutional questions which this office leaves to the courts.

058-283—October 3, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM; PUBLIC SERVICE AFTER RETIRE-
MENT UNDER SERVICE CONTRACT—DEFINITION OF
"REEMPLOYMENT" AND "STATE AND COUNTY
OFFICERS AND EMPLOYEES"—§§122.16 AND
122.02(1), F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does the rendition of public services, by a retired member of the state and county officers and employees retirement system, for compensation pursuant to service contracts, constitute reemployment within the purview of §122.16, F. S.?

Section 122.16, F. S., provides that "any person who has accepted and is receiving retirement compensation under this chapter shall have such compensation suspended during any period of *reemployment in any capacity whatsoever* by the state or any political subdivision or any department, branch or agency thereof . . ." (Emphasis supplied.) The key phrase in this section appears to be "reemployment in any capacity whatsoever," and the key word is "reemployment." Nowhere in Ch. 122, F. S., is the above phrase or key word specifically defined.

When construing a section of a statute or law each part of the section should be construed in connection with every other part of the law or act (82 C. J. S. 691, et seq., §345) and effect must be given to the entire statute or law (82 C. J. S. 705, et seq., §346). The statute should also be construed with reference to other statutes upon the same or similar questions (82 C. J. S. 799, §365) including prior statutes on the same subject matter. It might be well to examine the definition of "state and county officers and employees," contained in §122.02(1), F. S., where such phrase is defined as including "all full time officers or employees who receive compensation for services rendered from state or county funds . . . provided that such compensation, in whatever form paid, shall be specified in terms of fixed monthly salaries by the employing state or county agency" or official. This definition defines who may

or shall become members of the state and county officers and employees retirement system, and does not necessarily define who should be considered as "employees" under said §122.16, F. S. Section 122.16 prohibits retired members of the retirement system becoming "employees" of the state or any of its subdivisions, departments, branches or agencies after retirement, but does not seem to extend to such persons becoming independent contractors under contracts with the state or any of its subdivisions, departments, branches or agencies after retirement.

"The question whether one is an employee or an independent contractor has been considered in many cases, and various tests have been applied in determining it, although it has been said that it is impossible to lay down a rule by which the status of men working and contracting together can be clearly defined in all cases as employees or independent contractors, for each case must depend on its own facts, and ordinarily no one feature of the relation is determinative, but all must be considered together; and ordinarily it is said to be a question of fact" (42 C. J. S. 638 and 639, notes 20-23). In this connection see the opinion of the court of appeals of Kentucky in *Talbott v. Public Service Commission*, 291 Ky. 109, 163 S. W. 2d 33, text 35, where that court stated that:

Although as we have seen the section applies to employees as well as officers, it does not follow that it applies to every person rendering services to the Commonwealth. It must be conceded that the latter may engage the services of individuals, firms, and corporations in such capacities as will leave them free to perform the details of their engagements according to their own designs and methods, and independent of the authority of the state, except as to the results to be obtained. Persons engaged in such capacities are neither officers nor employees of the state; they differ therefrom in that the detail of their work is prescribed neither by law nor by a superior in authority. The services they render in return for the compensation paid are neither continuous nor regular, nor are they in performance of requirements of a permanent nature, as is usually the case when performed by employees. Persons rendering such services are known to the law as independent contractors.

"The chief or master test, or the principal consideration in determining the question, is the right to control the manner of doing the work, so that, generally speaking, it may be stated that if the employee is under the control of the employer he is a servant or employee and not an independent contractor, but if, in the performance of the work, he is not under the control of the employer he is an independent contractor; it is not, however, the actual exercise of the right by interfering with the work but rather the right to control which constitutes the test" (42 C. J. S. 639-640, notes 24 and 25). "Generally speaking, the term 'independent contractor' signifies one, who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of the work" (*Daves v. Rain*, 28 Ala. App. 54, 178 So. 59, text 62).

No general answer, applicable in all cases, may be made to

the above question, as such answer depends upon the service contract in each separate case. We can only say that if the contract for services, by the retired member, is one of an independent contractor, under the above authorities, that the answer to the above question is in the negative, but if one of employment, the answer is in the affirmative.

058-284—October 3, 1958

INSURANCE

CREDIT INSURANCE—MEANING OF TERM “REAL ESTATE LOANS” IN §646.01 (3), F. S.—§646.01 (1), (2), F. S.

To: *J. Edward Larson, Insurance Commissioner, Tallahassee*

QUESTION:

Section 646.01 (3), F. S., provides that credit life insurance shall not include life insurance sold in connection with “real estate loans” of more than 36 months duration. A corporation which sells shell houses to be constructed upon real estate owned by the purchaser offers a time price on said houses to be secured by a first mortgage on said real estate. If the indebtedness is payable over a period in excess of 36 months can the corporation procure credit life insurance to cover the unpaid balance?

The only question involved is the meaning of the term “real estate loans” as used in §646.01 (3), F. S. This somewhat inelegant term apparently means a loan secured by a mortgage of real estate. The distinction between a loan of money and a purchase of goods on credit is a well-established distinction in the law. See Words and Phrases, Vol. 25, pp. 435, et seq. In the case of *Dillon v. J. W. Walter, Inc.*, 98 So. 2d 391, it was held by the district court of appeal of Florida, 1st district, that where labor and materials were furnished to construct a house on a credit basis secured by a note and mortgage on the real estate, there was neither a loan nor the forbearance of a debt within the contemplation of the usury statute.

In §646.01 (1), F. S., distinctions are made between a borrower of money and a purchaser of goods and between a loan and a credit transaction. In §646.01 (2), F. S., the same distinctions are made. However, §646.01 (3), prohibits credit life insurance only in connection with “real estate loans.” It is a fair assumption, therefore, that the word “loans” in the term “real estate loans” was used advisedly and that said term was intended to mean loans of money secured by real estate. It is my opinion that since no loan of money is involved in the type of transaction in question, said transaction is not a “real estate loan” within the contemplation of §646.01 (3), F. S.

Your question is answered in the affirmative.

058-285—October 3, 1958

ELECTORS AND ELECTIONS

REINSTATEMENT OF PREVIOUSLY REGISTERED ELECTORS
—§§98.081, 98.091, 98.201, AND 98.291, F. S.To: James L. Graham, Jr., Attorney, Florida State Association of
Supervisors of Registration, Tallahassee

QUESTION:

May a qualified elector whose name has been removed from the registration books be reinstated at a time when the registration books are closed?

Section 98.081, F. S., a part of the election code relative to the permanent registration system, provides in part:

... Names will be restored to the registration records when the elector in person makes known to the supervisor that his status has not changed. The supervisor is then required to reinstate the names on the registration books at any time the books are open without the elector reregistering ... (emphasis supplied).

It would appear at first blush that the issue at hand is completely resolved by the phraseology found in the above quoted statute. There are, however, three other sections of Florida Statutes which, although not a part of the section dealing with permanent registration, are a part of the election code and tend to cloud the issue at hand. Those statutes are:

98.201 *Custodian of registration books.*—... no election official shall allow such person to vote, whether the person has a certificate or not, unless he exhibits to the election officials a certificate signed by the supervisor showing that he has been restored to the books subsequent to the date of the erasure.

The supervisor may, at any time, ... verify the qualifications of an elector ... as otherwise provided in §98.081 ... (emphasis supplied).

97.091 *Electors must be registered in precinct.*—... When an elector's name does not appear on the registration books of the election precinct in which he is registered and resides and when he cannot present a valid certificate of registration, he may have his name restored upon making satisfactory proof to the supervisor, of the fact of his previous registration, that his name has been omitted from the books and that he is entitled to have his name restored.

98.291 *Names may be restored to registration books.*—When the name of any elector has been wrongfully or erroneously erased, the name of the elector is restored by the supervisor on application and proof to him, or restored by order of the board of county commissioners, if the supervisor fails to do so.

It is a general rule of statutory construction that where at all possible related sections of the statutes should be read and considered in para materi (Palmquist v. Johnson, Florida, 41 So. 2d 313; Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So. 2d 234). A thorough analysis of the statutes involved does not reveal any clear repugnancies among the above quoted sections. It appears from the final line in the last paragraph of §98.201, F. S., that §98.201 was intended to be implemented under the

procedure described in the preceeding §98.081, F. S. This being the case, it is obvious legislative intent that these two sections be construed, in *pari materia*.

While it is not as easy to read §98.081, F. S., in *pari materi* with §97.091, F. S., as it was with §98.201, F. S., just referred to, such a construction is not impossible, since there is no clear repugnancy between §97.091 and §98.081. Section 97.091 is silent as to the time when names may be reinstated, and therefore it might be implied from reading that section in isolation that such reinstatement might be done at any time. When, however, §97.091 is read together with §98.081, there is only one possible conclusion and that is the reinstatement under the permanent registration should be made only at a time when the registration books are open.

Under the situation outlined in §98.291, F. S., an elector's name may be restored at any time. This appears proper in those situations where the name should not have been removed in the first instance and this office has held in A. G. O. 050-432 and 050-147.

In situations where an elector through his own negligence fails to return the form mailed out by the supervisor of registration under the provisions of §98.081, F. S., it seems to have been the legislative intent that those names should only be restored to the registration books by way of a personal appearance of the elector involved before the supervisor of registration at a time when the registration books are open.

Since §98.081 is a part of that portion of the election code relating to permanent registration, this opinion would have no application in those counties which have adopted and are not operating under a permanent registration system.

Conditioned upon the statements presented herein, your question as set out above is answered in the negative.

058-286—October 9, 1958

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—SHORT SALES OF STOCKS, ETC.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are short sales of stock through a stock broker
intangible personal property subject to taxation under
Ch. 199, F. S.?

"There are different ways in which a customer may trade in stocks. The customer may buy stocks 'long,' which is where he purchases stocks now with the expectation of selling them for a profit in the future; or he may sell them 'short,' which is where he sells stocks he does not possess, and borrows the number of shares he has sold from some third person to deliver to his vendee, expecting to be able to buy the stocks later at a lower figure and returning them to the person from whom he borrowed them . . . See 1 Don Passos, *Stock Brokers and Stock Exchanges*, pp. 200-204" (*Henderson v. Usher*, 125 Fla. 709, 170 So. 846, text 851). Short "is a term of stock and produce exchanges . . . and implies only that he has less of the commodity than may be necessary to meet demands and obligations" (38 C. J. S. 71, §1, note 13). "Men who have nothing to deliver sell and agree to deliver upon a cer-

tain day that which they have to go into the market and buy" (U. S. v. Patten, CCNY, 187 Fed. 664, text 668).

"Upon a short sale no gain or loss can be realized by the seller until the transaction is closed by a covering purchase and settlement with the lender of the borrowed stock. What is paid to the lender for the use of the borrowed stock should be regarded as an expense of selling and an offset against the price received . . ." (Commissioner of Internal Revenue v. Levis, CCA 2d, 127 Fed. 2d 796, text 797, 142 A. L. R. 1146, text 1148). "The loan of stock is usually, although not necessarily, incidental to a 'short sale.' As the phrase indicates, a short sale is a contract for the sale of shares which the seller does not own or the certificates for which are not within his control so as to be available for delivery at the time when, under the rules of the exchange, delivery must be made If he does not have them available, he must procure them for the purpose of making delivery. This he may do by purchasing or borrowing the required shares, delivery of the certificates to be made to the broker to whom he has already contracted to sell. If he borrows them, he deposits with the lending broker their full market price; and until the loan is returned, this deposit is maintained, by means of daily payments back and forth between the borrower and the lender, at the varying level of the market value of the shares loaned . . ." (Provost v. U. S., 269 U. S. 443, 46 S. Ct. 152, 70 L. ed. 352, text 354).

Whether the seller purchases the stock for purposes of delivery to the purchaser or borrows the required shares, making the necessary deposit or other arrangement therefor, title to the shares of stock passes to the purchaser and does not remain in either the seller or the broker (as far as this particular transaction is concerned). There is an obligation on the part of the seller to purchase and replace the borrowed stock or to furnish funds with which the broker may purchase and replace such borrowed stock. Although the term "borrowed stock" is used title nevertheless passes to the purchaser. The term is used in the sense of an obligation to replace the stock so procured with other shares of like stock. Title to the borrowed stock becomes vested in the purchaser and not the seller. No gain or loss is actually realized by the seller until the transaction is closed by a covering purchase. Although the seller may, from day to day, have a prospective gain or loss on the transaction such gain or loss does not accrue until the transaction is finally closed; although there may be a running account between the broker and the seller.

Therefore, short sales of stock through a stock broker do not constitute a property right in the seller subject to our intangible personal property taxing statutes. We have here considered the taxability of the *short sales* only, not the running account which may be maintained with the broker, which are classified as class "D" intangibles.

058-287—October 9, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
SHERIFFS—CONTRACTING TO FEED PRISONERS—
§§839.08, 839.09 AND 839.091, F. S.**

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

1. May a sheriff contract for feeding prisoners:
 - a. With himself or a member of his family?
 - b. With an employee or a member of his family?
2. May a sheriff purchase food for feeding prisoners from himself, or from a mercantile concern with which he is financially connected?

In opinion 058-245, dated Aug. 6, 1958, I held a sheriff may contract for the feeding of prisoners, basing this conclusion upon the fact that a sheriff must be granted a reasonable discretion in the feeding of his prisoners. In opinion 058-146, dated April 24, 1958, I held the sheriff of Monroe county may purchase automobiles from and have them serviced at an establishment which he owns provided they are purchased and serviced pursuant to sealed bids.

This latter opinion was written with §839.08, F. S., in mind. This section provides that no state or county officer shall purchase public supplies or materials from himself or from any firm or corporation in which he is interested. Section 839.08, was held not operative in the above opinion under the authority of §839.091, F. S., which provides:

(1) No person shall be subject to prosecution under §§839.08 and 839.09 when such purchases are:

(a) Made from the lowest bidder under sealed bids, or

(b) Where such purchases are made at current market prices under a rotation system by which purchases are rotated among the different suppliers; or

(c) Where purchases are made at current market prices and are for an aggregate amount in any calendar year of not more than one thousand dollars.

(d) For utility services, newspaper advertising, telephone or telegraph service, insurance premiums or similar services.

(2) The provisions of this section shall not apply to counties of the state with population of more than one hundred thousand.

I feel the same law applies in the questions which you raise and I, therefore, answer your questions accordingly.

AS TO QUESTION 1a:

The sheriff in counties with a population of 100,000 or less does not fall within the prohibition of §839.08, F. S., and may, therefore, contract with himself or a member of his family for feeding prisoners, provided he complies with the provisions of §839.091, F. S. The sheriff of a county which has a population of more than 100,000 may not so contract with himself, nor do I feel he could contract with a member of his immediate family. Public policy and §839.08, F. S., forbid such contracts and the sheriff in this instance is not within the exception of §839.091, F. S.

Question 1a is answered accordingly.

AS TO QUESTION 1b:

The purpose of §839.08, F. S., as I stated in opinion 058-146, *supra*, was to prevent the conflict of interest which would arise when an officer deals with himself. Absent the specific statutory provision, an officer would be prohibited by public policy from such dealings. A deputy sheriff is an officer of the state, and as such would be under the prohibition of §839.08, unless he falls within the exception of §839.091, F. S. I also feel any employee of the sheriff's department, even if not specifically included within §839.08, is by public policy prohibited.

Question 1b is, therefore, answered the same as 1a.

AS TO QUESTION 2:

This question is also answered the same as 1a.

058-288—October 9, 1958

CRIMINAL PROCEDURE

BLOOD TESTS—ADMISSIBILITY OF RESULTS AS
EVIDENCE—EXPERT TO ADMINISTER

To: G. C. Durrance, County Prosecuting Attorney, Okeechobee
QUESTIONS:

1. Are the results of a blood test admissible in evidence to prove a degree of intoxication?

2. If your answer under question 1 is "yes," who is qualified to administer such a test?

In *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752, the supreme court of Florida discussed the admissibility of the results of a blood test and stated at p. 753:

Constitutional inhibitions of this character grew out of the common law right of the accused against self-incrimination. The rule is set forth in 22 C. J. S., Criminal Law, §651, that

"Evidence resulting from a medical examination of accused for the purposes of the prosecution rather than for treatment, after an accusation has been made against him, is admissible where, in the absence of any compulsion, accused submits of consents to the examination."

See also *Greenleaf on Evidence*, 16th Ed., Sec. 4693, and *Wigmore on Evidence*, 3d Ed., Sec. 2263.

It would seem that our court recognizes that any privilege against self-incrimination which a defendant may have as to evidence of an analytical test for intoxication may be waived, and is waived by him, where in the absence of duress he submits or consents to the examination. From an examination of the *Touchton* case, *supra*, it is clear that the *express consent* of the defendant is not necessary in order to render the results of a blood examination admissible in evidence.

Subject to the rules outlined in the *Touchton* case, your 1st question is answered in the affirmative.

As to question 2, the person administering the blood test should be an expert in the field, sufficient to qualify as such at trial. An expert witness is one who by reason of education, training or experience has peculiar knowledge concerning some matter of science or skill to which his testimony relates. Medical doctors are frequently called upon for such services and in some localities there are

nonmedical experts who are qualified to make tests of this character and to testify as to the results disclosed by such tests.

058-290—October 14, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—MEMBERS OF THE FLORIDA STATE
PILOTS ASSOCIATION—§§310.01, 310.03 AND 122.02, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are bar or port pilots duly licensed as such under and pursuant to Ch. 310, F. S., state or county officers or employees within the intent and purview of the state and county officers and employees retirement system?

Section 310.01, F. S., makes provision for the appointment of boards of pilot commissioners "for each county in this state in which a port is located," which board, under §310.03, F. S., examines persons desiring to become bar or port pilots for such port as to their qualifications as such pilots and to license them if and when found qualified. The number of pilots to be licensed for certain named ports is by the said statute limited.

The court, in *State v. Jones*, 16 Fla. 306, text 311, stated that "while we think it clear that a pilot is not an officer within the meaning of the Constitution, still he is invested with powers and privileges which do not appertain or belong to every citizen. In this country, and under our institutions, such rights, privileges and powers as these, invested by law in the citizen, being of a public nature appertaining to commerce and exercised by virtue of legislative grant, *are franchises*." This rule does not seem to be a universal one (70 C. J. S. 1062, §1, notes 17-21). "The legislature may make reasonable regulations, and may require the examination and licensing of those engaged in such work (franchises in respect to skilled occupations), without creating a monopoly; and this principle has been applied in the case of physicians, dentists, druggists, pilots and plumbers" (58 C. J. S. 962, §7). The bar or port pilot is not compensated for his services by the state, but is paid by the owner or master of the vessel or, sometimes, the agent, consignee or charterer of the vessel (70 C. J. S. 1077, §12).

It, therefore, appears that bar or port pilots are not "state and county officers and employees," within the intent and purview of Ch. 122, F. S. (§122.02(1), F. S.).

The above question must, thereupon, be answered in the negative.

058-291—October 15, 1958

TAXATION

**LEASEHOLD INTERESTS AS INTANGIBLE PERSONAL
PROPERTY SUBJECT TO TAXATION**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are leases of real property containing covenants against cancellation by either party intangible personal property subject to taxation in this state?

The lease directly in question contains the following covenant:

It is hereby agreed that if the herein demised property be encumbered by a mortgage and the rentals hereunder assigned to the mortgagee, that under no condition or circumstances shall the lessee be entitled to cancel this lease, nor shall the payments provided for herein be discontinued as long as any part of the said mortgage loan remains unpaid, and this agreement shall inure to the benefit of the mortgagee. It is further agreed that this lease shall not be cancelled or terminated by any act of the lessor without the consent of said mortgagee as long as the said mortgage or any part thereof may remain unpaid.

This provision makes no change in the obligations of the lessor and the lessee under their contract; it only prohibits any cancellation of the lease agreement without the consent of the mortgagee, in case the leased property is encumbered by a mortgage (see 32 Am. Jur. 703, §826; 51 C. J. S. 844-848, §230). This covenant is in effect a written waiver of the right of the lessor and the lessee to rescind the lease for cause or the action of either of the parties so long as the property is encumbered by a mortgage. The legal rights and obligations of the parties are not changed; only the right to rescind for cause is waived. The monetary obligation of the lessee to the lessor, or his nominee, the mortgagee, is not changed, nor is the obligation of the lessor under the promissory note or other obligation secured by the mortgage changed. We seem to have here an irrevocable agreement on the part of the lessee to pay rent, in accordance with the terms of the lease agreement during the full term of the lease. It seems possible that this agreement might continue should the leased premises be destroyed, so long as the lands described in the lease remained. However, this does not seem to change the monetary obligation of the lessee under the terms of the contract; although he may have waived his right to cancel for cause. His right to cancel for cause is merely an inchoate right until the right to cancel for cause becomes effective by reason of such a right becoming effective. Only in case the right to cancel for cause arises would there be any change in the obligation of the lessee, and we cannot presume that such a right is bound to arise during the term of the lease; such a right is at most a mere contingency until such right to cancel may arise.

The lessee's promise under the covenant is merely that he will continue the leasehold interest, although causes may arise which would under usual circumstances permit a cancellation of the lease for cause; however, this right is one that might be waived even though there be no covenant against cancellation. The most that may be said of the covenant is that the lessee agrees to pay rent as and when due, notwithstanding the advent of causes which might under usual circumstances justify cancellation. There is no agreement on the part of the lessee to pay the mortgaged debt or obligation. The consideration passing to the lessor from the lessee, which the lessee agrees to continue to pay, which agreement seems to inure to the benefit of the mortgagee if any, is merely and only "the lessee's promise in the future to pay rent—a future payment for a future use. Under the circumstances, rent to be paid in the future is not a debt until it becomes either due or owing; and when the leases were executed no rent was either due or owing." (De Vore v. Gay, Fla., 39 So. 2d 796). Although the covenant may be said to obligate the lessee to pay the rent when and if due, for the benefit of

the mortgagee; yet the payments are to be made in the nature of rent and within the rule of *De Vore v. Gay*, supra. In either case we are concerned with the lease obligation and not an additional obligation. There is only one monetary obligation.

The above stated question is, therefore, answered in the negative in the light of *De Vore v. Gay*, supra.

058-292—October 15, 1958

COURTS

JUVENILE COURT—TRANSPORTATION OF CHILD COMMITTED TO INDUSTRIAL SCHOOL—§§39.06 AND 30.23, F. S.

To: Bert A. Davenport, Juvenile Court Judge, Panama City

QUESTIONS:

1. After the juvenile court has ordered a child committed to a state industrial school, whose duty is it to transport the child to said school?

2. May a juvenile court counselor be directed by the juvenile judge to transport a child to the state industrial school to which he or she has been committed by the juvenile court?

Section 39.06, F. S., relating to process and service provides in subsections (8) and (9) thereof as follows:

(8) All process, orders, commitments to an industrial school, and other papers issued out of the juvenile court or by the judge thereof in the capacity of committing magistrate may be served or executed, as the judge may direct, by the counselor or an assistant counselor of that juvenile court, or in the same manner as process issued out of a circuit court.

(9) No fee shall be paid for service of any process, orders, or other papers by a counselor or assistant counselor, but any expense incurred therein shall be paid out of the juvenile court fund, except expense incident to transportation of children to an industrial school, which expense shall be paid out of the fine and forfeiture fund of the county wherein the child was found. If any process, orders, or other papers are served or executed by any sheriff or constable, the sheriff or constable shall be compensated in accordance with law out of the funds of the county set aside for that purpose, and not out of the juvenile court fund. (Emphasis supplied.)

Section 30.23, F. S., relating to fees of sheriffs and constables provides, among other things, as follows:

The fees to be charged by the sheriffs and constables of the state shall be as follows:

State hospital and industrial schools for boys and girls; conveying prisoner to

per day for himself	\$8.00
per day for each guard actually necessary	8.00
and mileage, per mile each way	.15

Provided, transportation is not furnished by the state or state institution to which the prisoner is to be conveyed. . . .

Replying to your 1st question it appears that the juvenile judge may direct who shall transport the child to the state industrial schools. (See §39.06(8), *supra*.)

In view of the foregoing it appears that your 2nd question should be answered in the affirmative.

058-293—October 15, 1958

**STATE-OWNED TANGIBLE PERSONAL PROPERTY
DISPOSITION OF FUNDS FROM SALE OF STATE-OWNED
PROPERTY—CONSTRUCTION OF §273.01(2), F. S.**

To: W. G. Hendricks, Board of Control, Tallahassee

QUESTION:

Is §273.08, F. S., relating to the disposition of funds derived from the sale of state personal property, applicable only to property purchased from general revenue funds?

Section 273.01 (2), F. S., defines property as "... all tangible personal property owned by the state."

This includes all personal property *owned* by the state, regardless of how it was acquired.

It would not include property held by the state in trust, such as the Westcott estate. As to what constitutes a trust fund, each such fund would have to be considered in the light of its own method of creation and particular circumstances.

Subject to the above observations, your question is answered in the negative.

058-294—October 16, 1958

**ELECTORS AND ELECTIONS
SCHOOL BOND ELECTION—DEFINITION OF FREEHOLDER
—§6, ART. IX, STATE CONST.; §100.241, F. S.**

To: John R. Godbee, Jr., Attorney, Board of Public Instruction, Volusia County, DeLand

QUESTION:

Is an elector who pays taxes on personal property a freeholder and thereby entitled to vote in a district school election for the purpose of deciding whether or not bonds will be issued against the district?

Section 6, Art. IX, State Const., provides, in part:

... The counties, districts or municipalities ... shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors. ...

A freeholder is "one who has an immediate beneficial ownership interest, legal or equitable, in the title to a fee-simple estate in land. ..." *Dean v. State* (Fla. 1917), 77 So. 107; also §100.241 (1), F. S.

In my opinion the language in §100.241 (2) (d) to which you refer, i.e., "Any registered elector who is not shown as a freeholder, but who presents to the inspectors a tax receipt showing a payment of taxes on property. ..." must necessarily mean real estate

in order to be consistent with the constitutional provision cited above.

Your question is therefore answered in the negative.

058-295—October 17, 1958

**REGULATION OF PROFESSIONS AND VOCATIONS
COMPENSATION OF BOARD MEMBERS, PREPARING AND
GRADING EXAMINATION PAPERS—§§456.17, 456.13
AND 215.37, F. S.**

To: W. M. Emmel, Secretary, Board of Examiners in the Basic Sciences, Gainesville

QUESTION:

Are the members of the board of examiners in the basic sciences entitled to compensation for their time consumed in preparing questions for examinations and in grading answers to such questions by applicants?

Section 456.17, F. S., (the Florida basic science law) provides that "members of the board shall receive ten dollars per day, or any part of a day, while attending official board meetings, not to exceed twelve meetings per year, and shall receive per diem and mileage as provided in section 112.061, from place of their residence to place of meeting and return, together with the expenses of the secretary" Section 456.13, F. S., provides that "no part of the preparation of questions, the actual giving of the examinations or the grading of papers may in any way be delegated to any person other than a member of the board, or otherwise performed by any person not a member of the board" The board of basic sciences examiners is named as one of the minor regulatory boards within the purview and operation of §215.37, F. S., under which section it must be financed solely and individually from income accruing to it from fees, licenses, taxes and other charges collected by the board, and all salaries and expenses "shall be paid as budgeted after said budgets have been approved by the state budget commission" The said budget must be prepared and approved as is provided by said section.

Although the statutes provide for compensation of members when attending meetings of the board, and for per diem and travel expenses, we find nothing in the statutes expressly mentioning compensation for the preparation of examination questions and the grading of answers to such questions, which are required to be performed by members of the board. An examination of the reports of the state budget commission to the legislature at its 1957, 1955, 1953, 1951 and prior sessions clearly shows that an allowance was made for salaries of members in excess of 12 meetings per year, unless they be extended meetings. For example, the allotment for each board member of the 1951-53 biennium was \$916.72 per year, and for the 1953-55 biennium was \$1,000 per year. Under §456.13, F. S., two examinations, one during each six months of the year, are to be held by the board. These figures strongly indicate that each member of the board is to be paid something in addition to the items specifically mentioned in §456.17 above, unless it is contemplated that examination questions are to be formulated and the answers thereto examined and graded during an official meeting. We feel that an examination of the above mentioned budget

reports to the legislature reveals that the legislature contemplated compensation to the board members for preparing for and holding the examinations, including the grading of papers.

An examination of the reports of the state auditing department indicates that audits of the board have been made upon the theory that board members are entitled to compensation for preparing examination questions and grading papers and answers to such questions. We, therefore, feel that both the legislature, by following the suggestions of the state budget commission, and the state auditing department in its audits of the accounts and records of the board, have placed a departmental construction upon the statute which we cannot say is clearly wrong. Administrative rulings are of considerable persuasive force in the interpretation of a statute (*Harvey v. Green, Fla.*, 85 So. 2d 829; *Volusia Jai-Alai, Inc. v. McKay, Fla.*, 90 So. 2d 334; *Green v. Stuckey's of Fanning Springs, Inc., Fla.*, 99 So. 2d 867).

We are, therefore, of the opinion that the legislature clearly contemplated that provision be made in the board's budget, prepared pursuant to §215.37, F. S., to compensate the members thereof for time consumed in preparing examination questions and in grading examination papers. This answers the above question in the affirmative. As a predicate for such compensation the board must prepare and submit to the state budget commission a proper budget for such payments and such budget must be approved by the said commission. Such payments must be paid from fees, etc., collected by the board.

058-296—October 22, 1958

TAXATION

LICENSE TAXES—EMIGRANT LABOR AGENTS—APPLICABILITY TO EMPLOYMENT OF PROFESSIONAL PERSONS—CONSTRUCTION OF §205.39, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Does §205.39, F. S., relating to the license requirement of emigrant or labor agents apply to persons or corporations soliciting professional services, particularly engineers of various kinds?

2. If the answer to the above question is in the affirmative, is it permissible for the Florida state employment service, without obtaining a license under §205.39, to assist in the recruitment of such professional services by screening applicants who respond to advertisements inserted in the newspapers by the employers prior to the actual employment of such persons by representative of the employer who is present in the state employment service office for such purpose?

3. If the answer to question 1 is in the affirmative, does the penalty clause contained in §205.39(5) contemplate that a state and county license must be obtained in each county in which a person or corporation solicits professional services?

4. If the answer to question 1 is in the affirmative, does advertising in a county newspaper only without representation and all answers to be sent to the home

office subject the employer to the requirement of a license in such county?

AS TO QUESTION 1:

The applicability of §205.39, F. S., is reflected in subsection (1) thereof, which provides that: "No person, firm or corporation shall carry on the business of an emigrant agent in this state without first obtaining a license therefor from the county tax collector in each county in which emigrants are to be solicited."

Further clarification on the applicability thereof is contained in subsection (2) which provides that the term "emigrant agent" shall be construed to mean "any person, firm or corporation engaged in hiring laborers, or soliciting emigrants in this state."

The language of the foregoing provisions clearly indicates that the license requirement is applicable to a person, firm or corporation whose sole function is the business of an emigrant agent.

Georgia, our sister state to the north, has a substantially similar provision relating to emigrant agents. In passing upon the applicability of the Georgia statute, the supreme court of that state, in *Theus v. State*, 39 S. E. 913, stated, among other things:

... To be engaged in a work, in the sense contemplated by acts imposing taxation, would seem to necessarily imply that the person so engaged must make that work his business or occupation. Giving the language this construction, which we think is not only fair, but necessary, the plaintiff in error was not shown to have been "engaged" in hiring laborers in this state, to be employed beyond the limits of the same. It is not claimed that he was an agent at all, nor that he made the hiring of laborers in any sense his business or occupation. The legislative enactment imposing a tax upon emigrant agents, and providing a penalty for the failure to register and pay such tax, was clearly intended to apply to persons who, as agents of others, make it their business to hire laborers in this state, to be sent beyond the limits of the state, and there employed by others. To extend its application to a resident of another state, who, being in this state, incidentally employs laborers on his own behalf to work for him beyond the limits of this state, would be entirely unwarranted. (Emphasis supplied.)

It would appear, therefore, that if a firm or corporation were soliciting laborers for its own use and not for the purpose of referring to an employer outside of the state, such person or corporation would not be amenable to the licensing requirement.

Further, the language of §205.39, F. S., implies a restriction to laborers when, in subsection (2), it states that: "The term 'emigrant agent,' as contemplated by this section, shall be construed to mean any person, firm or corporation engaged in hiring laborers, or soliciting emigrants in this state, to be employed beyond the limits of this state; provided, however, that the provisions of this section shall not apply to the United States employment service, the war manpower commission, the Florida state employment service, or any state or federal agency engaged in recruiting or referring laborers for employment beyond the limits of this state." Although at first blush it would appear that the general term "soliciting emigrants" would be all-inclusive, upon more careful reading it appears restricted by the term "laborers" preceding the term "soliciting emigrants" and the subsequently employed plural noun "laborers" in the latter

part of the sentence would further militate against the acceptance of an all-inclusive interpretation.

The nature of this statute, and perhaps indicative of its meaning, is reflected in *State v. Napier*, 63 S. C. 60, 41 S. E. 13, by the following language of the supreme court of South Carolina in passing upon the question of the constitutionality of a substantially similar statute which exists in that state:

... The statute ... affects only those who carry on the business of an emigrant agent, whose vocation is to hire laborers and solicit emigrants to be employed beyond the limits of the state. It is easy to see that the business is of such a nature that the legislature might well see fit to thus regulate it, not only for the protection of the agricultural and manufacturing interests of the state, but for the protection of the laborers themselves against the acts and solicitations of designing and irresponsible persons, who may ply such a vocation in order to levy contributions from the ignorant and allured laborers, and then not be found when the laborers, according to appointment, appear at the railroad station to take their departure with him to their fields of labor. Payment of the license fee, and the issuance of a license by the proper authority, affords some guarantee or evidence of good faith in the conduct of such business.

The foregoing language of the supreme court of South Carolina not only reflects the fact that such provision is applicable only to laborers, but also reflects the fact that it is applicable to persons whose sole function is the solicitation of emigrant laborers.

Should there be any question as to whether the solicitation of professional services could be contemplated by the use of the term laborer or labor, recourse is made to *Black's Law Dictionary* wherein, at p. 1015, a laborer is defined as "... One who subsists by physical labor ... one who furnishes his personal service, of a grade commonly performed by persons working by the day ... A person without particular training employed at manual labor under a contract terminable at will ..."

Further assistance in this regard is found in *24 Words and Phrases*, wherein, at p. 50, is found a discussion of the term "laborer" as employed in a given statute:

The term "laborers" as used in *Rev. St. A. 3312 Vernon's Ann. Civ. art. 5480*, providing that laborers in the construction or repair of a railroad shall have a lien for wages due, as used in its ordinary sense. Ordinarily this word cannot be used as embracing persons engaged in learned professions, but, rather, such as gain their livelihood by manual toil. When we speak of laboring or working classes, we do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their physical ability. In one sense the engineer is a laborer; but so is the lawyer and the doctor and the banker, yet no statistician has ever been known to include these among the laboring classes.

Further persuasion for restricting provisions of §205.39, F.S., to those engaged solely in the function of soliciting emigrant labor is the admonition that in the construction of penal statutes

any doubt as to their meaning should be resolved in favor of the person who is considered in violation thereof. See *Watson v. Stone*, 148 Fla. 516, 4 So. 2d 700. See also opinion 044-356, dated Dec. 6, 1944, AGO 224, wherein it is said that taxing statutes with penal provisions should be strictly construed with all doubts or ambiguities resolved in favor of the taxpayer.

AS TO QUESTION 2:

Inasmuch as question 1 is in the negative, response to question 2 is unnecessary at this time. However, for whatever future direction it may furnish, permit us to state that the language of §205.39(2), F.S., excluding "the Florida state employment service" from the restrictions of such section contemplates such service as the agent of the employer for such purpose. Should the employer assist the state employment service with additional paid talent in the way of personnel officers subject to the control of the service for the purpose of recruiting employees such would not detract from the exemption granted.

AS TO QUESTION 3:

As in question 2, this question need not be answered at this time, inasmuch as question 1 was answered in the negative. However, for whatever future direction it may provide on a matter which may be answered otherwise, the following language of §205.39 (1) and (3), F.S., is noted:

(1) No person, firm or corporation shall carry on the business of an emigrant agent in this state without first obtaining a license therefor *from the county tax collector of each county in which emigrants are to be solicited.* (Emphasis supplied.)

(3) No person, firm or corporation shall be entitled to a license, which shall be good for one year, upon the payment to the county tax collector, for the use of the state of the sum of one thousand dollars and, for the use of the said county, the sum of five hundred dollars, *which license shall be valid only in the county where purchased.* (Emphasis supplied.)

Implicit in the foregoing language is the requirement that a separate license tax be charged for each county in which an emigrant agent operates.

AS TO QUESTION 4:

As mentioned in the answer to question 1, the licensing requirement of §205.39, F.S., is applicable to those who "carry on the business of an emigrant agent *in this state*," and such an agent is one who is "engaged in hiring laborers, or soliciting agents *in this state*."

The rule of statutory construction referred to in the answer to question 1 is also applicable here.

In discussing the meaning of a term employed in an Alabama statute similar to the term contained in the Florida statute under consideration, the supreme court of Alabama in *Abel v. State*, 8 So. 760, stated:

... To "engage in or carry on business" has been uniformly construed as signifying "that which occupies the time, attention, and labor of men, *for the purpose of a livelihood or profit.*" (Emphasis supplied.)

Further on, the court indicated that one act alone would not be sufficient to a finding of "engaging or carrying on the business,"

but that all other "necessary preparations" must coalesce for such a finding.

The same court in a later case concerning the application of the term "engaging in or transacting any business" to a foreign corporation stated in *J. R. Watkins Co. v. Hamilton*, 26 So. 2d 207, at p. 210 thereof:

What acts constitute "doing business" in this State by a foreign corporation cannot be judicially defined with precision. The question must be determined by the facts of each particular case. It is clear under our decisions however that before the acts done by the foreign corporation in this State can be said to fall within the purview of our constitutional and statutory provisions, such acts performed in this State must be in the exercise of some of the functions for which the corporation was organized, that is, *in the transaction of the real or chief business of the corporation* rather than the performance of acts merely within the corporate powers. . . . (Cases cited have been omitted.)

It is doubtful that the mere insertion of a classified advertisement in a Florida newspaper by a nonresident person or corporation could be considered as "carrying on" or "engaging in" a business in Florida.

Your questions are answered accordingly.

058-297—October 23, 1958

COURTS

CIRCUIT COURT—COMMITMENT AND RELEASE OF JUVENILE CONVICTED OF FELONY—§§782.04, 39.02(2), (6); 955.18, 955.19, 955.21 AND 955.22, F.S.

To: Arthur G. Dozier, Superintendent, Florida School for Boys, Marianna

QUESTIONS:

1. Can a circuit court alter by commitment the fact that the authority for release from this school is vested in the board of commissioners of state institutions?
2. Does the circuit court have the authority to issue what amounts to a double commitment whereby you are directed to hold a boy for a certain period of time and then turn him over to the division of corrections of the state?

The youngster in question was duly adjudged to be guilty of the offense of second degree murder, and sentenced "to be imprisoned by confinement at hard labor in the Florida industrial school for boys and the state prison of the state of Florida (division of corrections of the state of Florida) for a period of 20 years from the date of his delivery to the superintendent, warden or proper official of the Florida industrial school for boys and the state prison of the state of Florida . . ." Under §782.04, F.S., second degree murder is punishable by imprisonment for life or for any number of years not less than 20 years.

The commitment subsequently issued in this cause first recited the sentence above quoted, and provided as follows:

WHEREFORE, it is hereby ORDERED by this Court that the said Defendant, JAMES FRANK KING, be and

he is hereby committed to the Florida Industrial School for Boys for the period of time, until said Defendant JAMES FRANK KING is transferred to and committed to the State Prison of the State of Florida (Division of Corrections of the State of Florida) or until the day said Defendant, JAMES FRANK KING reaches the age of Eighteen (18) years.

It is further ORDERED by this said Court, that at any time prior to the date that said Defendant, JAMES FRANK KING reach the age of Eighteen (18) years, should for any cause or reason the Superintendent of the Florida Industrial School for Boys, or the Director or Superintendent of the State Prison of the State of Florida (Division of Corrections of the State of Florida) deems it necessary to transfer said Defendant from The Florida Industrial School for Boys to the State Prison of the State of Florida (Division of Corrections of the State of Florida) or on the date the said Defendant, JAMES FRANK KING, reach the age of Eighteen (18) years, said Defendant, JAMES FRANK KING, shall be transferred and delivered into keeping of the Custodian of the State Prison of the State of Florida (Division of Corrections of the State of Florida) and there said Defendant, JAMES FRANK KING, shall be kept and safely imprison for the remainder and balance of the aforesaid Sentence of Twenty (20) Years.

Your questions are therefore answered in light of their applicability to the above sentence and commitment.

Other factual data material to the problem presented is as follows, according to information at hand:

The youngster was indicted for the offense of first degree murder during the spring term of the circuit court in and for Hamilton county in 1957.

He was 12 years of age at the alleged time of the offense, as well as at the time of indictment.

Jurisdiction was first assumed by the juvenile court of Hamilton county, and formally waived and transferred after indictment was filed for first degree murder.

Section 39.02(1), F.S., provides in pertinent part:

The juvenile court shall have exclusive original jurisdiction of dependent and delinquent children domiciled, living or found within the county or district in which the court is established. . . .

Section 39.02(2), F.S., provides:

All proceedings against a child for alleged violation of law must be brought in the juvenile court, except as provided in subsection (6) of this section.

Section 39.02(6), F.S., provides in pertinent part:

If the judge deems that any child brought into juvenile court as a delinquent child, who is fourteen years of age or older, and who, if an adult, would be charged with a violation of Florida law constituting a felony, should be transferred to the court which would have jurisdiction of the child if the child were an adult, or if any child brought into juvenile court as a delinquent child, and who, if an adult, would be charged with a vio-

lation of the laws of Florida, so demands prior to or at the commencement of the hearing before the court, the judge shall enter an order waiving jurisdiction and certifying the case to the court which would have jurisdiction of the child if the child were an adult, *and thereafter the child shall be subject to the jurisdiction of the other court as if the child were an adult*; . . . providing further, that any child, irrespective of age, who, if an adult, would be charged with a violation of Florida law punishable by death or life imprisonment and such offense is presented to the grand jury who returns an indictment against said child, then the juvenile court shall waive its jurisdiction of said child for said offense and shall transfer the child to the proper court having jurisdiction to try said offense.

From the above authority we thus conclude that the circuit court of Hamilton county, properly exercised its jurisdiction in trial proceedings which resulted in a judgment entered by said court against the youngster of guilty of murder in the second degree.

The sentence imposed for such offense and the resulting commitment, however, give rise to further analysis of prevailing legal authority.

A thorough examination of the provisions of Ch. 955, F. S., with particular reference to §§955.18, 955.19, 955.21 and 955.22 leaves me with the following conclusions:

A circuit judge has no authority to sentence or commit anyone to the Florida industrial school for boys, wherein such sentence and commitment are based solely upon a conviction for a felony or misdemeanor. I am not unmindful that such authority did formerly vest in the circuit court (but only in cases where the offense was punishable by imprisonment for a term less than life) by virtue of §955.20, F. S., prior to 1943, at which time this section was repealed by the legislature, and authority of various judges to commit certain convicted minors reverted to §415.21, F. S. The provisions of §415.21 did not apply to children accused or guilty of rape, murder, manslaughter, robbery, arson or burglary, or attempts thereof. However, this section was repealed by the legislature in 1951, and supplanted by the enactment of Ch. 39, entitled "Juvenile Courts," cited above.

Under §39.02(6), F. S., when a child is charged with a felony, and jurisdiction is duly relinquished by the juvenile court, and vested in the circuit court, "the child shall be subject to the jurisdiction of the other Court as if the child were an adult." Chapter 39 makes no provision for the commitment of a child to the industrial school wherein such commitment is based upon a conviction for a felony.

I find further that the only authority for such commitment is vested in the pardoning board of the state, by virtue of the power of commutation vested in it by §955.18, F. S.

I find further that aside from the committing authority of the pardon board, above mentioned, the only remaining authority to commit minors to the industrial school of Florida is vested exclusively in the various juvenile judges of the state. I am not unmindful of the provisions of §955.19, F. S., which confers certain committing powers upon county judges and circuit judges. This statute now stands as last revised in 1927, and pertains only to the

commitment of juveniles in consequence of incorrigible and vicious conduct, and not to convicted juveniles as such. Section 39.02, F. S., enacted as amended in 1955, provides that the juvenile court "shall have exclusive original jurisdiction of dependent and delinquent children. . . ."

It is my opinion that §39.02, F. S., effectively repealed §955.19, in that the provisions of §3, Ch. 26880, 1951, (which chapter first brought into being the above quoted provision of §39.02), concluded with the following legislative statement:

All laws or parts of laws in conflict with this act . . . are hereby repealed to the extent that they are in conflict with or inconsistent with this act.

I am confident that the circuit judge, in the instant case, was motivated by his strong humane instincts and a sincere desire to commit the child directly to an institution wherein the child would be subjected to an environment more in keeping with the circumstances of his tender years. While such action is laudable, it nevertheless was beyond the scope of authority vested in the circuit judge in this particular circumstance. Substantially, the same desired result might well have been legally effected had the judge sentenced the child to prison and immediately recommended to the pardon board that such sentence should be conditionally commuted in accordance with the provisions of §955.18, F. S.

Commutation by the pardon board in the instant case would have resulted in the child's being transferred to the industrial school for: (1) a period of time not to exceed his majority year; (2) until such time as he should be released by the board of institutions as reformed; or (3) until such time as it should be determined that his commutation should be revoked as an incorrigible, whereupon he would be returned to prison to serve the remainder of the original sentence.

It is therefore my considered opinion that the commitment by which you now exercise supervision over the child in question is void as to the provisions contained therein which relate to the Florida industrial school for boys.

058-298—December 17, 1958

CRIMINAL PROCEDURE

QUASI-JUDICIAL HEARINGS PURSUANT TO §903.54, F. S.— EXCLUSION OF PHOTOGRAPHERS AND TELEVISION CAMERAMEN

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTION:

When a hearing is conducted pursuant to §903.54, F. S., should television or newspaper cameramen be permitted to photograph the proceedings within the hearing room?

Section 903.54, F. S., provides the procedure for the revocation, suspension, denial of, or refusal to renew the license of a professional bail bondsman or limited surety agent. Under said section the bondsman must be given notice of the charges against him and he has a right to a hearing on said charges. At the hearing the state must submit evidence and witnesses to support its charges

and the bondsman has the right of cross-examination, the right to present witnesses and submit evidence, and the right to be represented by counsel. The hearing, while not limited to all the formalities of courtroom procedure, is a formal hearing and is characterized as a "quasi-judicial" proceeding. The requirements of due process of law apply to such a hearing (1 Fla. Jur., Administrative Law, §109).

It appears that the problem herein resolves itself into the basic question of the right of news and television cameramen to photograph administrative or quasi-judicial proceedings.

For some time now since the spectacular growth of the broadcasting industry, television representatives have sought equal access to the news with the other media of communication. This subject has invoked considerable controversy and discussion, particularly in legal circles, where some opposition has mounted concerning the use of television cameras in covering court trials, quasi-judicial and administrative hearings.

Heretofore, the practice governing television as well as radio coverage of court trials and other public proceedings of a similar nature in Florida has been established by canon 35, promulgated by the American bar association in 1935, as a result of adverse publicity of the Hauptman trial involving the kidnapping of the Lindberg infant.

Canon 35 provides: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room . . . and the broadcasting and telecasting of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions thereto in the mind of the public, and should not be permitted."

The adoption of the canons of ethics by the Florida supreme court did not give the canons force of law, and therefore they remain the criteria, or system of principles of exemplary conduct and good character, which principles are subject, however, to modification to meet the conditions of changing times in keeping with the constitutional rights of the people. Such a transition to meet changing needs and conditions is underway in many states (Craig v. Harvey, 331 U.S. 367, 374; Maryland v. Baltimore Radio Show, 338 U.S. 912, 920; E. W. Scripps Co. v. Fulton, Ohio App., 125 N.E. 2d 896) (Iowa, Radio Television News Dir. Assn. Bulletin, July, 1955, p. 2; North Carolina, Broadcasting-Telecasting, Feb. 14, 1955, p. 80; Tennessee, Radio Television News Dir. Association Bulletin, March, 1955, p. 2; Texas, Gray, "Reality is Light Enough," Broadcasting-Telecasting, Feb. 14, 1955, p. 38).

Undoubtedly there must be decorum in the conduct of judicial and administrative hearings. No conditions or situations can be tolerated which would in any way detract from the decorum and dignity of such proceedings, which must be conducted in such a manner as to be conducive to the ascertainment of truth uninfluenced by extraneous matters. To this extent canon 35 serves a laudable purpose, but even as to judicial proceedings there is a strong belief on the part of some members of the public which is supported to a degree by judicial authorities in some jurisdictions that the canon should not operate as a complete bar to any photography, broadcasting or telecasting of court proceedings.

At this point it should be clearly stated that a trial in a

court of law is very different from a legislative or quasi-judicial hearing.

The trial of a case has as its primary purpose the determination of a controversy; the welfare of the people is affected only in so far as "justice is rendered" and a precedent is established for future controversies. An administrative hearing on the other hand is primarily concerned with and affects the general welfare of the public at large rather than particular individuals. Since the public itself is the party with the greater interest, including the concomitant right to be informed, communication media such as television should be given greater freedom than when individual persons are involved in a judicial controversy.

To state that the right of privacy of an individual is violated when televised at such a public event, appears to be a contradiction. The very nature of a public administrative hearing precludes the assertion of this objection. Certainly no censorship would be tolerated which would forbid the publication of events and personalities connected with administrative bodies' deliberations. Restrictions of this nature would not be condoned by our society which has always revered the beneficial effect of open access to public events. A person cannot reasonably assert that his right to privacy has been seriously infringed upon if his words and features are electronically reported in reference to matters affected with a public interest in an administrative hearing when such right of privacy is not violated by written newspaper reports of his similar activity.

A televised report of the event differs from a printed report only in that different means are used to communicate the facts to the public. It is apparent that a person has no right of privacy when involved, willingly or unwillingly, in a public event which is newsworthy enough to command public attention and concern. This should be considered a portion of the price we must pay for the guarantee of liberty which an enlightened public can provide for itself (*Berg v. Minneapolis Star & Tribune Co.*, D. C., 79 F. Supp. 957; *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304; *Jacova v. Southern Radio & T.V.*, 83 So. 2d 34; *Smith v. Doss*, 37 So. 2d 118; *Jones v. Herald Post Co.*, 18 S.W. 2d 972; *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752).

An enlightened public is the great bulwark of democracy and justice. Telecasting has two unique contributions to make toward this enlightenment. First, it can present to the public exactly what is happening, not what some other person says is happening. No better example need be cited than the emotionally charged congressional hearings such as the army-McCarthy hearings. The only reliable source of information as to what occurred in that crowded room was the impartial eye of the television camera and the objective microphone which enabled all the citizens of the country to gather the unedited facts upon which to base an unbiased, unemotionalized judgment.

The second advantage of the broadcast media is to present public events in a form which stimulates the interest of our citizenry. The telecast of administrative and quasi-judicial proceedings provides a source of vicarious experience and a means of educating the public to perform in the future as witnesses and commission members.

The Kefauver committee investigating the organized crime in the U. S., permitted the proceedings to be televised and forcefully

brought to the attention of the people the seriousness and the gravity of their problem. The public was able to judge the apparent qualifications of its public servants for the jobs they were attempting to perform, see the tactics of counsel representing powerful underworld characters, and politicians of a local level and, above all, observe the mannerisms, the facial expressions and countenances of the persons involved.

The McClellan committee, now current, demonstrates the high plane reached by visual reporting and is alerting the public to the perils that beset its citizenry, in a way that not long ago was not even dreamed possible (*Lyles v. State of Oklahoma*, Adv. Sheet No. A-12, 595).

There is probably no field of government about which the people should know as much as the judicial system, the bulwark of democracy. The institutions of justice are engaged in construing constitutional rights and interpreting legislative acts, which determine to a great extent our enjoyment of the much-espoused but little understood rights enumerated in the first amendment to the constitution. It is highly inconsistent to complain of the ignorance and apathy of voters and then close the windows of information through which they might learn and observe. No harm could result from portraying by photo and screen the true picture of administrative and quasi-judicial proceedings.

Deeply involved in this matter is the constitutional right of freedom of speech and of the press. Freedom of the press is guaranteed by the first amendment to the constitution of the U. S. and this protection encompasses both federal and state law (*Cantwell v. Conn.*, 310 U. S. 296 (1940)). This right of freedom of speech and of the press need not be amplified and supported in this opinion. It suffices to say that the right may be freely exercised as long as it does not infringe upon or injure the rights of others. It is not an absolute, but rather a relative right. It is implicit that the power of a state to enact regulations may not be so employed to abridge individual liberties secured by the constitution to those who wish to speak, write, print or in any way circulate information.

The long-established right of the press in the U. S. to gather and disseminate information and news concerning every phase of human activity, together with the incidents appertaining thereto cannot be denied. This right makes the press the most potent servant of the people in protecting their rights against the acts of tyranny, fraud and corruption as well as a most prolific medium of information and education. Hence, we can understand why it has been many times held that these provisions of free press extend to broadcasting and television (*Burstyn v. Wilson*, 343 U. S. 495, 72 Sup. Ct. 777, 96 L. Ed. 1098; *Public Utilities Comm. v. Pollak*, 343 U. S. 451, 72 Sup. Ct. 813, 96 L. Ed. 1068; *Superior Films, Inc., v. Dept. of Ed.*, 346 U. S. 587; *Wrather Alveaz Broadcasting Co. v. Hewicker*, 305 P. 2d 236).

As is said in *People v. Jelke*, 308 N. Y. 56, and *U. S. v. Kobli*, 172 Fed. 2, 1919, the courts may in unusual circumstances restrict the attendance of the public for various sound reasons, which in some instances might include pressmen and television men, but they cannot under the constitution, exclude the public, generally or entirely. The doors of our tribunals must never be closed for star chamber sessions.

Referring back to the previously cited canon 35, which based

its objections to broadcast coverage on the detraction of dignity and decorum from the witness and the proceedings. No one has been heard to complain that the employment of this relatively new television medium upon the solemn occasion of the presidential inauguration or the coronation of Elizabeth II or the annual Christmas mass of the pope was lacking in decorum and dignity and violative of private rights. No complaints are heard that the employment of these modern devices of thought transmission in the pulpits of our great churches destroys the dignity of the service; that they degrade the pulpit and create misconceptions on the mind of the public. It is obvious that that which is carried out with dignity will not become undignified because more people may be permitted to see and hear (Justice Moore, *In re hearing concerning Canon 35*, 296 P. 2d 465).

The technological advances in television and newsreel photography have progressed to the point where interference from noise and presence in the hearing room no longer afford a valid objection to their use.

A further substantiation of our position is found in an amendment to the previously cited canon 35, adopted in 1942, which permits broadcasting of naturalization proceedings for the express purpose of publicly demonstrating in an impressive manner the essential dignity and serious nature of naturalization.

In light of the foregoing, I conclude that the extension to newsreel and television coverage of quasi-judicial and administrative hearings is not now violative of the intent, spirit and meaning of canon 35; that reasonable televising and photographing such public administrative hearings is not an unreasonable invasion of an individual's right of privacy; and the denial to television and news photographers the same privileges as are afforded other members of the press constitutes an unwarranted discrimination.

Therefore, it is my opinion that news and television photographers should be granted the right to photograph public hearings such as those contemplated by the question herein propounded subject, however, to such reasonable restrictions and regulations as the public officer or administrator conducting an administrative hearing may deem appropriate to maintain dignity and decorum in the conduct of the proceedings, avoiding unnecessary noise, glare or obstruction or other improper interference with the orderly and lawful conduct of the hearing. We believe that public officers conducting administrative hearings will in most instances be able to allow reasonable photographing and televising of the proceedings without undue interference.

If claims are made by a witness that his right of privacy is unlawfully invaded, the administrator should consider the same in the light of the principles enunciated herein. If there is a substantial disagreement with a ruling of the public officer conducting the hearing in this regard, right of review may be had in the courts, either by the party claiming right of privacy or by the party claiming the right to photograph or televise the proceedings.

There may be exceptional cases where administrative hearings for valid reasons are closed to all news reporting. I refer to those administrative hearings where state secrets or criminal investigatory considerations are involved. In the ordinary open administrative hearing, however, there seems little reason to refuse reasonable photographing and televising although there may be excep-

tional situations where health of the witness or the nature of the testimony (Jelke's case) may warrant such refusal. Interference with the right of privacy and the dignity and decorum of the proceedings would appear so slight where the photographing and televising is reasonably done in the usual hearing as not to warrant denial either because of civil rights or detracting of the proceedings.

As a practical matter the administrator at a hearing should lay down ground rules governing the televising and photography procedure, so as to preclude unreasonable interference with the proceedings or subject persons taking part in the hearing to health hazards or harassment or annoyance to the extent of hampering them in giving or taking testimony.

The foregoing considered, your question is answered in the affirmative.

058-299—October 31, 1958

ELECTORS AND ELECTIONS

NUMBER OF ELECTORS REQUIRED TO PARTICIPATE IN ELECTION UNDER §167.29, F. S.

To: Paul S. Buchman, City Attorney, Plant City

QUESTION:

Do the provisions of §167.29, F. S., contemplate that a majority of all the qualified electors of any given municipality must present themselves at the polls on election day and vote in favor of a municipal library or does this section merely contemplate that the issue must receive a favorable majority vote of those persons participating in the election regardless of the number of qualified electors actually voting?

Section 167.20, F. S., provides in part:

Establishing and maintaining library; election; tax.—

Whenever the city or town council of any incorporated city or town in this state shall deem it advisable to establish and maintain a public library and reading room free for the use of the inhabitants of such city or town, they shall call an election to decide whether such public library and reading room shall be established in said city or town, and, *if a majority of the registered voters of such city or town, at such an election, shall vote in favor of establishing and maintaining such public library, the city or town council of such incorporated city or town shall establish the same . . .* (Emphasis supplied.)

At first blush a literal translation of this statute would seem to contemplate that a majority of the registered electors of the municipality must participate in the election and vote in favor of the issue. However, the Florida supreme court has ruled in several cases dealing with similar acts that phraseology such as that italicized in §167.29, F. S., quoted above, does not contemplate anything more than approval by a simple majority of those electors actually participating in the election.

In *Harris v. Baden*, 154 Fla. 373, 17 So. 2d. 608, the Florida supreme court dealt with Ch. 22380, special acts of Florida 1943, which provides in part:

This Act shall become effective upon its being approved

and ratified by a majority of the qualified electors of the territory described in Section One of this Act

In that case the court said:

The appellants assert that it was necessary for at least a majority of the . . . registered voters of the territory to participate in the election and vote in favor of approving and ratifying the act before it could become law. We do not agree. *We are of the opinion that the term "a majority of the qualified electors of the territory described in Section One of this Act at an election to be held on the first Tuesday, in August, 1943" means a majority of the qualified electors of the territory who actually voted upon the measure at election day, not a majority of the voters who may have had the right to vote.* Electors who are qualified to vote at an election and yet do not avail themselves of this privilege are deemed to have assented that the question shall be determined by those who do vote (*Bell v. City of Ocala*, 62 Fla. 431, 56 So. 683; *Pickett v. Russell*, 42 Fla. 116, 28 So. 764; *State ex rel Lanier v. Sumter County Commissioners*, 19 Fla. 518; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517) (Emphasis supplied.)

In *Bell v. City of Ocala*, supra, the court said:

We think the term "a majority of the registered voters of the city," as used in section 12, c. 3963, must be construed to mean a majority of those qualified electors who actually voted at the election on the 16th day of May, 1911, and not a majority of all voters who had the right to vote

It appears from the above cited authority that a municipal library may be authorized under the provisions of §167.29, F. S., when approved by a simple majority of the electors participating in such an election.

058-300—October 31, 1958

CRIMINAL PROCEDURE

ISSUE OF WARRANTS WITHOUT DEPOSIT BY JUSTICE OF THE PEACE IN WORTHLESS CHECK CASE—§§939.16, 832.05(1), (6)(a), 811.021 AND 811.021(3), F. S.

To: *Hugh F. DuVal, Jr., Justice of the Peace, 1st District, Miami and Malvin E. Englander, Justice of the Peace, 5th District, Miami Beach*

QUESTION:

Is the crime of making, issuing, etc., a worthless check, draft, etc., under the provisions of §832.05, F. S., a crime of a public nature in which a justice of the peace court may issue a warrant for persons so charged without first requiring the deposit provided for in §939.16, F. S.?

Section 939.16, F. S., provides:

Prepayment may be required in courts of County Judges, etc.—In all cases justices of the peace and county judges in this state shall require payment in advance or

security for costs of process, service of the same, and of examination, unless the party applying for a warrant shall make an affidavit of insolvency and of substantial injury to person or property by him suffered, in which case process shall issue without payments of costs.

In *Simmons v. State ex rel Tew*, 71 Fla. 340, 71 So. 278, and *Osceola County v. State ex rel Newton*, 115 Fla. 5, 155 So. 119, the Florida supreme court held that this section had no application to crimes of a public nature. In the *Osceola county* case, *supra*, the court stated further that felonies were crimes of public nature.

Subsequent to the two supreme court decisions referred to above, this office has been called upon to consider the application of §939.16, F. S., to worthless check cases. See A. G. O. 041-153, 1941-1942 Biennial Report of the Attorney General, p. 781, and 050-290, 1949-1950 Biennial Report of the Attorney General, p. 621. In each case the opinions sought clarification where the offense was a misdemeanor.

Since the writing of the opinions just referred to, the state legislature enacted Ch. 28096, 1953, which is now incorporated in the general statutes as §832.05, F. S. The pertinent provisions of this act are §832.05 (1) and (6) (a), and provide as follows:

(1) PURPOSE.—The purpose of this section is to remedy the evil of giving checks, drafts, bills of exchange and other orders on a bank without first providing funds in or credit with the depository on which the same are made or drawn to pay and satisfy the same, which tends to create the circulation of worthless checks, drafts, bills of exchange and other orders on banks, bad banking, check kiting and a mischief to trade and commerce.

(6) PENALTY.—

(a) Any person violating the provisions of this section shall be punished in the same manner as provided by law for punishment for the crime of larceny.

The penalty provision found in §811.021, F. S., makes the crime of larceny or worthless check passing in the amount of \$100 or more a felony.

It would appear from the authority set out above that the passing of a worthless check in the amount of more than \$100 is definitely a crime of a public nature as defined by the Florida supreme court in *Osceola County v. Newton*, *supra*.

The passing of a worthless check in the amount of less than \$100 is a misdemeanor, §811.021(3), F. S., and in the previous rulings of this office the misdemeanor offense of passing a worthless check was not considered to be a crime of a public nature.

In the light of the above quoted legislative declaration found in §832.05 (1), F. S., this office finds the comments in A. G. O. 041-153 and 050-290 relative to requiring a deposit under the provisions of §939.16, F. S., no longer applicable in worthless check cases. It appears that the legislature has definitely brought the crime of worthless check passing into the field of crimes of a public nature and it is now the opinion of this office that the crime of worthless check passing should therefore be lifted from the requirements of §939.16, F. S.

Your question is answered accordingly.

058-301—October 31, 1958

**REGULATION OF TRADE, COMMERCE AND INVESTMENTS
APPROVAL OF CONSTRUCTION PLANS OF PUBLIC LODGING
OR FOOD SERVICE ESTABLISHMENT—CONSTRUCTION
OF §509.211 (4), F. S.**

To: *Richard Edgerton, Commissioner, Hotel and Restaurant Commission, Tallahassee*

QUESTION:

Is it proper for the supervising architect of the state hotel and restaurant commission to examine and approve or disapprove construction plans of a public lodging or food service establishment, which have been drawn by a registered engineer?

Subsection (4) of §509.211, F. S., relating to safety regulations, provides as follows:

Before the erection or remodeling of any building for use as a public lodging or public food service establishment is begun, the registered architect's plans or registered engineer's plans, with detailed specifications, shall be approved by the supervising architect or engineer of the hotel and restaurant commission; all plans, specifications and drawings submitted for the purpose of securing building permits from any state, county or municipal building inspector, or other officer having like jurisdiction, shall bear the signature and seal of the architect or engineer and supervising architect or engineer of the hotel and restaurant commission before said building permit is issued; when such plans and specifications are submitted to the supervising architect or engineer of the hotel and restaurant commission for approval they shall be accompanied by a remittance of an amount equal to the license fee prescribed for an establishment of such size as provided in this chapter, provided that new construction or remodeling costing ten thousand dollars or less need not be accompanied by plans of a registered architect or engineer but scaled drawings shall be submitted to the hotel commission's architect or engineer for approval, as a condition precedent to securing a building permit.

This section presupposes that most public lodging or public food service establishments, which are to be constructed, or undergo major remodeling, will have the services of both an architect and an engineer and that before the construction plans are approved and before a construction permit is issued by any state, county or municipal building inspector or authority, to construct such building, the construction plans shall be approved by the supervising architect or supervising engineer of the hotel and restaurant commission and the building permit must carry the signature and seal of the contractual architect or engineer, as well as the signature and seal of the reviewing architect or engineer of the hotel commission.

This section has an exception to new construction or remodeling repairs to public lodging and food service establishments costing less than \$10,000. In such an event, detailed plans from

an architect or engineer need not be submitted to the hotel commission prior to securing a building permit, but in that event, scaled drawings of the work to be accomplished are required to be submitted to the hotel commission's architect or engineer for approval prior to securing a permit.

In opinion 057-48, we pointed out that the professions of architecture and professional engineering overlap in certain instances and the legislature, in enacting §509.211(4), *supra*, recognized this overlapping and provided for the safety and security of the general public by requiring plans from a person licensed to practice architecture or engineering.

Both of the professions involved have strict codes of ethics and it is quite reasonable and feasible that in some instances a reviewing engineer or architect of the Florida hotel and restaurant commission could properly accept the plans and specifications of a registered engineer on a certain type of construction while in other instances he could accept the plans and specifications of a registered architect and in still other instances, in order to fully protect the public, he would need the plans and specifications of both a registered architect and a registered professional engineer.

In opinion 057-48 we said:

The provisions of §509.211(4), F. S., cannot be construed as to authorize the general practice of architecture by a professional engineer. The professional engineer, of course, may perform architectural services which are purely incidental to the practice of engineering. Whether architectural services performed by the professional engineer are purely incidental to the practice of engineering or whether such services are in reality a practice of architecture depends upon the facts and circumstances in each individual case.

You submitted another question, but inasmuch as it has to do with the powers and duties of another administrative agency and since it has long been the policy of this office to refrain from giving one agency an opinion concerning the powers and duties of another, we do not deem it either necessary or advisable to answer the question.

058-302—October 31, 1958

**COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
REAL ESTATE APPRAISERS EMPLOYED BY COUNTY—
§193.111, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are boards of county commissioners authorized to employ competent persons to make an appraisal of all taxable real and tangible personal property, or either, in their counties, under the supervision of the county assessor of taxes?

The board of county commissioners is authorized to have a company or board of appraisers make an appraisal of all property in the county and the expenditure of county funds for such purpose has been declared by the legislature to be a county purpose. The original of such appraisal by statute is required to be

deposited with the tax assessor. Duplicates are to be deposited in the office of the board of county commissioners (§193.111(1) (2) (3), F. S.).

The answer to your question seems to turn on the degree of control and supervision exercised over the employed appraisers by the tax assessor. If the tax assessor exercises complete control over the activities of the employed board of appraisers and actually makes the determination as to the value of the property which is the subject matter of the re-evaluation program then it would seem that the appraisers would actually be the employees of the tax assessor and if the budgetary provisions for the tax assessor's office so provides, their compensation would be an expense of the tax assessor's office.

I point out in A. G. O. 057-3, that the assessment program contemplated by §193.111, is a county function, the purpose of which appears to be to furnish the board of county commissioners with necessary information in connection with their activities pertaining to county taxation; viz, board of equalization, duty to levy taxes for county purposes, etc.

Although the board of county commissioners has no authority to assess taxes, it does, as the governing body of the county, have certain responsibilities in connection with the exercise of the county taxing power, and it is my opinion that, although the appraisers employed under the authority of this section are required to furnish the tax assessor a copy of their works, they are county employees and, as such, may cooperate with the tax assessor in a re-evaluation program so long as the actual evaluation of the property is made by the board of appraisers, rather than the tax assessor.

058-303—October 31, 1958

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

PUBLIC LODGING OR FOOD SERVICE ESTABLISHMENTS— EJECTION OF GUESTS—§§509.141(1), 509.101, 871.04(2), F. S.

To: *Frank C. Stanley, Jr., Justice of the Peace, 3rd District, Polk County, Auburndale*

QUESTION:

Does subsection (1) of §509.141, F. S., and particularly the last portion thereof, vest discretion in the management of a public lodging or food service establishment to determine whether or not it would be detrimental for the establishment to further entertain any particular guest and thereupon remove, cause to be removed, or eject such guest from the establishment?

In considering this question there are several statutes which must be taken into consideration.

Section 509.101, F. S., specifically provides in part as follows:

(1) Every proprietor or manager of a public lodging or public food service establishment may prescribe and establish reasonable rules and regulations for the government and management of any such lodging or food service establishment, and its occupants and employees; and every lodger, boarder, guest tenant, or person staying, sojourning, eating or employed in said lodging or

food service establishment shall conform to and abide by said rules and regulations so long as he shall remain in or at said lodging or food service establishment

Of course, the proprietor of a public lodging or food service establishment, in making rules and regulations, must keep in mind other statutes, i.e., §871.04(2), which provides as follows:

No person, directly or indirectly, for himself or for another, shall publish, post, broadcast by any means, maintain, circularize, issue, display, transmit, or otherwise disseminate or place in any manner before the public with reference to an establishment any advertisement that the patronage of any person is not welcome, or is objectionable, or is not acceptable because of his religion. No person shall cause or solicit another person to violate this section.

Section 509.141, F. S., sets forth the method for ejection of undesirable guests. However, in both §§509.101 and 509.141, the action must be commenced by the owner or person in charge of the establishment.

Section 509.141, F. S., sets forth certain definite and specific matters for which a guest may be ejected by the management, i.e., intoxication, immoral conduct, profane language, brawling and using language or conducting himself or herself in a manner so as to disturb the peace or to disturb the comfort of the other guests of the public lodging or food service establishment. The last portion of §509.141, when read in connection with the other provisions, would read as follows:

The manager, assistant manager, desk clerk or other person in charge or in authority in any hotel, apartment house, tourist camp, motor court, restaurant, rooming house or trailer court shall have the right to remove, cause to be removed, or eject from such hotel, etc., any guest of said hotel, etc., who, . . . indulges in conduct such as to injure the reputation or dignity or standing of such hotel, etc., . . . or who, in the opinion of the management, is a person whom it would be detrimental to such hotel, etc., . . . to further entertain.

In *Martin v. Monmouth Park Jockey Club*, 145 Fed. Supp. 439, affirmed per curiam by the U. S. court of appeals for the third circuit April 4, 1957, a jockey, Robert J. Martin, attempted to enjoin the Monmouth Park jockey club from refusing him permission to ride mounts racing at the said jockey club. Martin had been suspended by the state of Maryland for a period of 10 years for placing a bet on a horse racing against one he was riding. The Maryland suspension led to his automatic suspension in other states, including New Jersey. Maryland reinstated Martin in 1955, following which he was reinstated by the state of New Jersey and issued a jockey's license by the New Jersey racing commission. His position was that since he had a license from the state racing commission of New Jersey the jockey club could not prevent him from riding. The court disagreeing with his contention said:

Although it is intensely regulated, the defendant club is a private organization. Nothing is more elementary than its right as a private corporation to admit or exclude

any persons it pleases from its private property, absent some definite legal compulsion to the contrary.

Our office does not pass upon the constitutionality of statutes as applied to all claims of right since that is a function of the court. However, based upon existing statutes it is our opinion that the general rule is that a private hotel or restaurant ownership has the right to reasonably decide for itself, whether or not the conduct of the guest is injuring the reputation, dignity or standing of the establishment, or whether it would be detrimental to the establishment to continue to entertain any particular guest.

This answers your question in the affirmative.

058-304—November 6, 1958

PUBLIC LANDS AND PROPERTY

APPLICATION OF DOCTRINE OF EROSION WITH REFERENCE TO FLORIDA UPLANDS—\$253.12, F.S.

To: *Van H. Ferguson, Director, Trustees of Internal Improvement Fund, Tallahassee*

QUESTIONS:

1. Is private ownership extinguished in lands which by gradual and imperceptible erosion are washed away and which become covered by navigable water at mean high tide?

2. Does such land vest in the state by virtue of its sovereignty?

AS TO QUESTION 1:

Erosion is the gradual eating away of the soil by the operation of currents or tides. (Black's Law Dictionary, 4th Ed.). It is distinguished from submergence, which is disappearance of soil under water and the formation of a navigable body of water. (Black's Law Dictionary, *supra*). The general rule is that where the location of the bed of a stream or other body of water constituting the boundary of land is gradually and imperceptibly changed by accretion, reliction or erosion, the bed of the body of water so changed remains the boundary, which is extended or restricted accordingly. (56 Am. Jur., Waters, § 477, p. 892; 93 C. J. S., Waters, § 80, p. 754). Thus an owner of upland gains by the gradual and imperceptible process when soil attaches to his upland and loses when through the same gradual process soil is washed away.

Under the common law of England, when the sea or an arm of the sea gradually and imperceptibly encroached on the land of a subject, the land thereby covered belonged to the Crown. (See Coulson and Forbes, Law of Waters, 4th Ed., p. 37). Thus the external boundaries situated on the sea or other navigable body of water may gradually shift as the water recedes or encroaches, although the right to the shore itself remains in the state or Crown. (Gould on Waters, 3rd Ed., § 155). While technically the encroachment referred to above might be termed submergence rather than erosion, I do not believe the law so far as change of boundary would differ. (See *Michelson v. Leskiewicz*, 55 N. Y. S. 2d 831, affirmed 63 N. Y. S. 2d 191, 270 App. Div. 1042.)

Although an upland owner loses a portion of his land by erosion, it may be regained by subsequent accretion or reliction,

provided a remnant has remained which may be identified. This is well stated in the early New York case. *Mulvy v. Norton*, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206, at p. 585:

... It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or suffices to enable another to acquire it, for the erosion must be accompanied by a transformation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. . . .

While we have found no Florida cases in which the appellate courts have discussed erosion, we have found a case where a special master said:

The plaintiff contends that the defendants have lost title to Government Lots 1 and 6 because the land has disappeared and is now a part of the Atlantic Ocean. All of the exhibits mentioned above, except the Government Survey, show that Government Lots 1 and 6 are now in the Atlantic Ocean and it is the opinion of the Special Master that the defendants have lost title thereto.

The circuit court overruled the objections filed to the special master's report and thereby affirmed the findings of law and fact (*Florida Land Holding Corp. v. Hamm, et al.*, 15th Judicial Circuit, Broward County Chancery No. 10910). The supreme court affirmed without opinion, 34 So. 2d 312. See also *Folsom v. Florida Land Holding Corp.*, 102 So. 2d 596, reaffirming this position.

In *Mexico Beach Corp. v. St. Joe Paper Co.*, 97 So. 2d 708 (Distr. Ct. of App., 1st Dist.), cert. den. 101 So. 2d 817, the court held the common law doctrine of accretion is operative in Florida. While the case did not involve erosion, the court did cite with approval 2 Blackstone, Commentaries, 262, a part of which, explaining the reason for accretion, states:

... and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore reciprocal for such charge or loss.

While, as I have stated above, I have found no cases where erosion was a question directly before the Florida appellate courts, I do feel the courts would follow the firmly established rule that title is lost by the gradual and imperceptible process of erosion.

Question 1 is answered in the affirmative.

AS TO QUESTION 2:

The state of Florida by virtue of its sovereignty acquired title to the beds of all navigable waters upon admission to statehood. (*Broward v. Mabry*, 58 Fla. 398, 50 So. 826). The trustees of the internal improvement fund are vested with title to all submerged lands under navigable waters except those heretofore conveyed by deed or statute. (See §253.12, F. S. Since the boundaries change by reason of erosion (see question 1, above), it follows that the state acquires a new boundary when private lands are eroded away. Since the state owns the bed of the navigable waters, it acquires those new areas resulting from

erosion. In this connection the New York courts said in *Mulvy v. Norton*, *supra*, at p. 585:

... When portions of the main-land have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the people, by virtue of their sovereignty, having authority over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. . . .

The state therefore, by virtue of its sovereignty, acquires title to submerged lands when erosion takes place.

Question 2 is answered in the affirmative.

058-305—November 10, 1958

PUBLIC MONEY

EXPENDITURE—CONSTRUCTION OF TERM “PUBLIC PURPOSE”—ENTERTAINMENT—§5, ART. IX, STATE CONST.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May a board of county commissioners, county board of public instruction, county fee officer or sheriff, or the governing body of a tax district, unless specifically authorized to do so by local or special act, spend public money for entertainment or hospitality in connection with publicity or advertising when expenditures for publicity and advertising are authorized by law, or in connection with proprietary or quasi-proprietary enterprises?

Section 5, Art. IX, State Const. requires that taxes be assessed only for county and municipal purposes, and applies equally to both cities and towns and to counties. Resort is, therefore, had in this opinion to the large body of law which has arisen in connection with this question, as it affects municipalities, since it will have equal application to counties.

It is fundamental that all moneys expended by counties and municipalities must be for public as distinguished from a private purpose. (Constitution, §5, Art. IX; *McQuillin on Municipal Corporations*, §39.19).

The question of what constitutes a public or municipal purpose has been considered by the Florida supreme court on many occasions. Recent decisions show an ever enlarging concept of municipal or public purpose.

In *State ex rel, Harper v. McDavid*, 145 Fla. 605, 200 So. 100, the city of Pensacola was held to be carrying out a municipal purpose in its use of city property for purposes of a low rent housing project. The question as to whether a municipal purpose was served in the construction of recreational facilities was answered in the affirmative in *Zinnen v. City of Fort Lauderdale*, (Fla.) 32 So. 2d 162. See also: *State et al v. City of Jacksonville*, (Fla.) 53 So. 2d 306. The expenditure of funds for the acquisition of a fire boat and mobile fire station was considered an expenditure for a municipal purpose in the *City of Jacksonville et al v. Savannah Machine and Foundry Co.* (Fla.) 47 So. 2d 634. *McQuillin on Municipal Corporations*, § 39.20, p. 38, et seq., cites the following instances from other jurisdictions wherein a public

purpose was found to exist, thus justifying expenditures of municipal funds: The maintenance of flying fields and airports, the erection of a tourist hotel, expenditures for radio broadcasts, expenditures for advertising the city, its resources and advantages. In considering the definition given to "public purpose" by the courts in the modern cases, Rhyne, Municipal Law, at p. 343, says:

... The concept of public purpose has expanded considerably since the 19th Century. The courts have recognized that public purpose is subject to change to suit industrial developments and to meet new social conditions.

Even with an expanding concept of public purpose, it seems clear from an examination of Florida cases, which have considered expenditures akin to those for entertainment or hospitality, i.e. those for advertising and publicity, and those in other jurisdictions which have considered the expending of public moneys for entertainment, that a public purpose will be found only in those instances where express statutory authority exists or provisions for such expenditures have been made in a municipal charter. Such power cannot be implied. McQuillin, §39.20, p. 38. As is said by McQuillin, §39.22, p. 60:

While authority to make such appropriations cannot rest upon the doctrine of implication, pure and simple, it may be and often is granted sometimes permissively . . .

Certain municipal charters expressly authorize appropriations for entertainment of guests and like purposes.

Three reported Florida cases have dealt with the problem of appropriations for municipal advertising. In *Loeb v. City of Jacksonville et al*, 101 Fla. 429, 134 So. 205, a city ordinance passed without statutory authority attempted to levy an ad valorem tax on city property for the purposes of creating a fund for municipal advertising. Such purpose was held illegal by the court. In *City of DeLand et al v. Moorhead et al*, 96 Fla. 737, 119 So. 117, the City of DeLand was restrained from collecting an ad valorem tax, revenue from which was to be used for publicity purposes. Although such a tax had been authorized in an earlier law, a later statute which was a complete revision of the city's charter, did not grant any such authority. The court said in passing that had such earlier statute remained in force, ample authority would have existed to sustain the tax.

The legality of a bonded indebtedness authorized by special act out of which one Anderson was to be paid for services rendered in advertising and bringing about the location of paper and pulp mills in the city was upheld in *City of Fernandina v. State*, 143 Fla. 802, 197 So. 454. The language of Mr. Justice Terrell, at p. 456, is applicable to some degree to the question in point.

We next approach the question of whether or not the payment of a fee to Mr. Anderson for inducing the pulp mill to be located within the city was a municipal purpose of the use of the city's funds for such a purpose as contemplated by Section 5 of the Constitution. The question of what constitutes a municipal purpose is not static. It should be determined at the time the constitution is construed rather than what was so considered at the time of its adoption.

The court sustained the indebtedness in this instance based on the language of the special act granting the city charter which authorized the city to do all things necessary and proper for the safety, health, convenience, and general welfare of its inhabitants. The court went on to say that

The fact of what constitutes a municipal purpose is a much broader one than it was when the Constitution was adopted, at which time police protection was the primary service extended by the municipality. The provision of the city charter . . . [i.e. the convenience and general welfare clause] was designed to give the city commission some latitude in determining such purposes, and so long as the causes selected are shown to be in the reasonable purview of the Constitution, they should be upheld.

It certainly cannot be disputed that attention to the economic welfare is one of the main concerns of the modern city. State, federal and local governments all recognized this, and *so long as such experiments are within reason and warranted by legislative fiat*, it is not within the power of this court to strike them down because it subscribes to a different economic theory or a different code of municipal morals. Even if in the making of such experiments the city picks up a "hot potato," it is not for this court to undo it for reasons of policy.

It follows from the reasoning of the court in the case above cited that changing conditions will be taken into consideration by the court when the question of an appropriation as constituting a public expenditure, is considered. It seems equally clear, however, that some basis in either legislative pronouncements or in the language of a municipal charter exist before expenditures such as those for entertainment and hospitality can be made. Municipal charters and special or local laws establishing county advertising commissions, if they delegate sufficient discretion in the publicizing or advertising of the city or county, may well be broad enough to encompass expenditures for entertainment and hospitality.

Courts in other jurisdictions which have considered this question have either sustained such appropriations on the basis of a statute or charter, or have declared such expenditures illegal, as not having a sound basis. In an annotation at 30 A.L.R. 1035, after a discussion of cases which disallowed incurrence of expenses for purposes of public celebrations and entertainments celebrating patriotic events, the following language is found at p. 1039:

. . . These decisions, however, all rest upon the principle that municipal corporations have no powers except such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. But it has never been doubted that the state could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people and to tax their citizens to pay the expense thereof. . . .

The city of Philadelphia was held in the case of *Tatham v. Philadelphia*, 11 Phila. (Pa.) 276, as reported in 30 A.L.R. at 1035, to have power under its charter to provide for the expense of entertaining distinguished visitors on the occasion of the

celebration of the anniversary of American independence. In the case of *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607, 299 Pac. p. 728, the court upheld the provisions of the city's charter which provided for an appropriation for advertising the city and entertaining public guests. In so holding, the court said at p. 730:

Furthermore, we are of the view that, by common consent, it is now generally held to be well within a public purpose for any given locality to expend public funds, within due limitations, for advertising and otherwise calling attention to its natural advantages, its resources, its enterprises, and its adaptability for industrial sites, with the hope of increasing its trade and commerce, and of encouraging people to settle in that particular community.

The Arizona supreme court, in *City of Tombstone v. Macia*, 30 Ariz. 218, 245 Pac. 677, sustained as a public purpose the building of an ice plant by the city. The court's language at p. 680 is of particular application to the instant question.

In considering what is properly a public purpose, we should not be controlled to too great an extent by decisions of courts in climates very distant from ours. Further, we should not be to too great an extent controlled by decisions which come from a remote time, and, therefore, may be out of tune with modern conditions. The question of what is a public purpose is a changing question, changing to suit industrial inventions and developments and to meet new social conditions. Law is not a fixed and rigid system, but develops a living thing, as the industrial and social elements which form it make their impelling growth. . . .

Finally, in *Stegmaier v. Goeringer*, 218 Pa. 499, 67 A. 782, in discussing the appropriation of moneys for city-sponsored celebrations observing important historical, military and civil events, the Pennsylvania supreme court set out this rule at p. 783, which is of significance to a consideration of the question at point:

. . . In the exercise of this power, the rule should be observed that moneys appropriated for these purposes should be expended under the supervision and direction of the proper officer or department of the city government, and that bills should be presented as is provided by law for the expenditure of other public funds. . . .

In light of the foregoing, it can be said that absent statutory authority, county officers cannot expend public funds for entertainment or hospitality purposes. Your question as propounded must be answered in the negative. However, where expenditures for advertising and publicity are authorized, the nature of such authority granted and the amount of discretion vested will determine if such expenditures can be made for hospitality and entertainment. The distinction of county enterprises as governmental, proprietary, or quasi-proprietary, does not in any way affect the expenditures in question.

Even where such expenditures can be sustained as subserving a public purpose, clear justification for the expenditures should be shown, and unless expenditures of this kind can reasonably be said to serve a public purpose, they should not be made.

If you find that some public agencies have been operating under a misapprehension as to the legal limitations upon such expenditures over a period of time without official objection, and that such expenditures served some public purpose, though unauthorized and were not excessive or unquestionably improper, you might consider suggesting ratification of the same by the legislature at its approaching session.

In any event, it would appear advisable for any public authority or agency to obtain legislative sanction at the 1959 legislature for any such expenditures if it feels that the same are essential to its proper functioning, so as to remove all questions in the future.

Your questions are, therefore, answered accordingly.

058-306—November 19, 1958

TAXATION AND FINANCE

COUNTY PUBLIC MONEY, HANDLING BY STATE AND COUNTY—CONSTRUCTION OF TERM "PUBLIC MONEY"—

§§219.01(2), 219.02, 219.04, 30.18, 193.43, 839.03, F. S.

To: L. W. Lambert, County Tax Collector, Clearwater

QUESTION:

Are money orders, checks, and other types of negotiable instruments included within the definition of "public money" as used in Ch. 219, F. S.?

Chapter 219, F. S., was derived from Ch. 57-349, 1957, the purpose of which, as expressed in its title, was "to provide for the safeguarding, safekeeping, and for the receipt and disbursement of public money; (and) to prescribe the duties of county officers and state officers in connection therewith." The intention of a statute is the law and should be determined and effectuated (*Ervin v. Peninsular Tel. Co.*, Fla., 53 So. 2d 647; *Overman v. State Board of Control*, Fla., 71 So. 2d 262) and courts should ascertain and give effect to the legislative intent (*State Dept. of Public Welfare v. Bland*, Fla., 66 So. 2d 59; *Florida State Racing Com. v. McLaughlin*, Fla., 102 So. 2d 574). Effect should be given to every part of a statute where possible and each part must be construed with every other part as a harmonious whole (*State v. Knight*, 98 Fla. 891, 124 So. 461; *Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333). In construing a statute we must look to its history, the evil to be corrected, the contemporary conditions, the object to be obtained and the legislative intent (*State v. Lee*, 113 Fla. 40, 151 So. 491; *Smith v. Ryan*, Fla., 39 So. 2d 281).

Subsection (2) of §219.01, F. S., provides that the term "public money" as used in the chapter "shall be taken to mean and include all money collected by a county officer which he is required or authorized by law, as such county officer, to collect, and underpayments, overpayments, partial payments and deposits of such money, except his salary. . . ." In other words, the term includes the moneys which the county officer "is required or authorized by law . . . to collect." It is made the duty of each public officer, under §219.02, "to issue a receipt for each collection of public money made by him," and retain a copy of such receipt as a permanent record. It is also, by said section, made "the duty of each officer to keep safely all the public money collected by him," and exercise all pos-

sible care for its protection, and keep the same "separate in the depository and shall not" commingle it with personal funds. The officer is required to place under bond "each deputy and employee handling public money." (§219.03, F. S.) Each officer is required to keep a cash book "wherein shall be entered daily all receipts and disbursements of public money . . . it shall show the amount of money on hand . . ." (§219.04, F. S.).

Although general definitions of "money" in law dictionaries, cyclopedias, Words and Phrases, Corpus Juris Secundum, and other authorities, do not generally include checks, bank drafts, and the like, within the term "money," sometimes, however, under statutes, or peculiar circumstances, checks, drafts and the like have been held "money" for purposes of the statute or circumstance. We are here dealing with a statutory definition and not a general definition of "money." Former §§30.18, 193.43 and 839.03, F. S., were long construed as extending to collections made, nor merely to the legal tender, under the federal statutes received. These sections were repealed by the 1957 act, now appearing as Ch. 219, F. S.

When we take into consideration the purpose and history of Ch. 219, and compare it to the statutes repealed by the 1957 act, it is clear that it extends, not to statutory legal tender, but to the proceeds from the collection of public obligations, whether in the form of cash, currency, checks, or other medium of payment. The statute was designed and intended to protect public funds from all dangers whatsoever, not merely legal tender from holdups, thefts, and the like. Although there may be more chance of the loss of legal tender through holdups, theft, and the like, than of checks, money orders, and the like, there is yet the possibility of loss thereof.

We, therefore, answer the above stated question in the affirmative.

058-307—November 20, 1958

REGULATION OF PROFESSIONS AND VOCATIONS
FLORIDA BOARD OF BEAUTY CULTURE—SCHOLARSHIP
AWARDS—§477.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Can the Florida state board of beauty culture award, in addition to the 10 scholarships provided by law for the current fiscal year, one that was awarded during the last fiscal year, but after the close of the fiscal year the person awarded the scholarship found that she could not use it?

2. Is it possible for the board to split this proposed 11th scholarship between two persons, which would mean an award of \$100 to each applicant instead of the \$200 provided by law?

Section 477.21, F. S., relating to the disposition of money by the state board of beauty culture, provides, among other things, that the board is charged with the duty and responsibility of awarding each year not in excess of 10 scholarships in beauty culture for courses in the various beauty culture schools in this state, which scholarships shall be in the amount of \$200 each.

In view of the foregoing it is my opinion that the board of beauty culture may award up to 10 scholarships in one year. It may award less than 10, but not in excess of 10. Your 1st question is answered in the negative.

Your 2nd question is moot due to the negative answer of the first question.

058-308—November 20, 1958

TAXATION

TAX EXEMPTION OF VACANT LOTS OWNED BY ELEEMOSYINARY CORPORATION—§1, ART. IX, §16, ART. XVI, STATE CONST.; §192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the lands of a nonprofit corporation the profits from which are used exclusively for educational, charitable, religious, scientific, literary or benevolent purposes, entitled to exemption from taxation?

Your attention is respectfully directed to §16, Art. XVI, State Const., which provides inter alia: "The property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes."

Section 1, Art. IX, State Const., provides for uniform and equal rate of taxation, except as to such property as may be exempt by law from municipal, educational, literary, scientific, religious or charitable purposes, and this comprehends the whole law for taxing real and personal property and authorizes enactment by the legislature of §192.06, F. S., which provides, in subsection (3) thereof, that the property of education, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall be actually occupied and used by them for the purposes for which they have been or may be organized, shall be exempt from taxation.

The file which accompanied the request for opinion reveals that the property, consisting of vacant lots, is owned by a nonprofit corporation which is restricted in its certificate of incorporation to use its funds exclusively for educational, charitable, religious, scientific, literary or benevolent purposes, so that no part thereof shall enure to the benefit of any private individual.

Thus we see that it is without question that the property is held for one of the exempt purposes, and the only question to determine is whether the property is used for one of the exempt purposes as found in the constitution and the statutes.

In the case of *Lummus v. Miami Beach Congregational church*, 142 Fla. 657, 195 So. 607, it was held that despite the fact that there was no building constructed on the land in question it was used and held exclusively for the purposes given in the constitution, although it was not continuously so used. The court went on to say "There is naught to show that it is used for any other than the appropriate activities of the incorporated church and as we related in the outset the deed conveying it contained the restriction we have quoted (that this property shall be used for church purposes only)." This language is particularly important in the instant case in that in the facts before us the certificate of incorporation carries the

restriction that the funds of the eleemosynary corporation be used exclusively for educational, charitable, religious, scientific, literary or benevolent purposes. This decision has been referred to with favor in the cases of *Fleischer Studios, Inc., v. Paxon*, 147 Fla. 100, 2 So. 2d 293; *S. A. Freel Distr. Co. v. Lenox*, 147 Fla. 550, 3 So. 2d 157; *State v. Doss*, 150 Fla. 491, 8 So. 2d 17; *American Can Co. v. City of Tampa*, 152 Fla. 798, 14 So. 2d 203, and *Riverside Military Academy v. Watkins*, 155 Fla. 409, 19 So. 2d 870.

This office has previously held in A. G. O. 051-38, dated Feb. 27, 1951, and reported in 1951-52 Biennial Report of the Attorney General at p. 276, that, under §16, Art. XVI State Const., the property of an incorporated church would be exempt from taxation even though said property consisted of vacant lots, if the tax assessor found that the property is held and used for some religious purpose. Also see A. G. O. 058-251, dated Aug. 26, 1958.

If vacant realty, which was held for future use at church sites, for religious conference grounds, and for other philanthropic purposes, was used exclusively by nonprofit charitable corporation for one or more of the purposes mentioned in §16, Art. XVI, it was entitled to the tax exemption. (1957 Opinion Attorney General 057-147, dated June 6, 1957).

Ownership and utilization of the property are the criteria for determining its exemption from taxation, and it is the duty of the tax assessor to ascertain from all available evidence and by personal observation whether the property claimed as exempt, because used for some charitable purpose, is actually and primarily used for that purpose.

Your question is therefore answered in the affirmative, if the tax assessor finds that the property is actually held and used for one of the exempt purposes.

058-309—November 20, 1958

CRIMINAL PROCEDURE

SERVICE OF PROCESS IN EVERGLADES NATIONAL PARK— STATE JURISDICTION—§264.08, F. S.

To: *J. Lancelot Lester, State Attorney, Sixteenth Judicial Circuit, Key West*

QUESTION:

Has the state ceded jurisdiction over the Everglades national park to the federal government or does there still remain in the state jurisdiction to serve process and exercise the right to investigate the cause of death where dead bodies are found in the park?

In 1929, the Florida legislature enacted Ch. 264, F. S., which authorized the conveyance of certain lands to the U. S. for the purpose of establishing the Everglades national park. The original act (Laws of Florida 1929, c. 13887, §12) reserved to the state concurrent jurisdiction with the U. S. government to serve civil process in all cases and criminal process as may issue under the authority of the state of Florida against any person charged with the commission of any crime, without or within said lands. That act was amended and presently appears as §264.08, F. S. Section 264.08, *supra*, now provides as follows:

264.08 *Authority of United States to acquire lands;*

jurisdiction over lands.—

(1) The United States may acquire by conveyance, and the commission may convey to the United States, pursuant to this chapter, all lands mentioned in §264.06, and for the purposes set out in the act of congress approved May 30, 1934, (public no. 267, 73rd congress)¹ and exclusive jurisdiction is ceded to the United States over and within all the territory in the state thus deeded or conveyed; saving, however, to the state the right to serve criminal or civil process, within the limit of the land or lands thus acquired, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crime committed, in said state outside of said land or lands, and on account of rights acquired, obligations incurred, or crimes committed on or within said lands, prior to the date of the giving or service of notice, as hereinafter provided, of the assumption of police jurisdiction over such land or lands by the United States; and, saving further, to the said state the right to tax sales of gasoline and other motor vehicle fuels and oil for use in motor vehicles, and to tax persons and corporations, their franchises and properties, on land or lands deeded or conveyed as aforesaid; and saving, also to persons residing in or on any of the land or lands deeded or conveyed as aforesaid, the right to vote at all elections within the county in which said land or lands are located, upon like terms and conditions and to the same extent as they would be entitled to vote in such county had not such lands been deeded or conveyed, as aforesaid, to the United States; provided, nevertheless, that such jurisdiction shall not vest in the United States unless and until it, through the proper officer or officers, notifies the governor and through him the state, that the United States assumes police jurisdiction over the land or lands thus deeded.

(2) All of the provisions of this section shall apply not only to lands conveyed to the United States by the Everglades national park commission for national park purposes, but also to all lands acquired for national park purposes within the present and future boundaries of the Everglades national park by the United States through and by purchase, grant, condemnation, donation or any other lawful means. (As amended Laws 1947, c. 23910, §1; Laws 1949, c. 25035, §11; Laws 1955, c. 29615, §33.

¹ 16 U.S.C.A. §§410-410c.

It is to be noted that §264.08, *supra*, reserves certain rights in said lands to the state of Florida. The state reserved the right to serve criminal process, within the limit of the land or lands thus acquired, for all crime committed in this state outside of said land or lands. It further reserved this same right over crimes committed on or within said lands until such time as the proper officer or officers of the U. S. government notifies the governor of Florida that the U. S. assumes police jurisdiction over the land or lands thus deeded. The statute clearly specifies that Florida has the right to serve criminal process within said park to the extent that such service is required for crimes committed outside of the boundaries of the Everglades national park. It is my opinion that investiga-

tions incident to such crimes may be made inside the park under this reservation.

With regard to crimes committed on or within the Everglades national park, an investigation by me failed to disclose that any notification has ever been received by the governor from the U. S. government assuming police jurisdiction over the park. Therefore, assuming that no such notice has been given, it is my opinion that the law enforcement officers of this state have police jurisdiction over said park for all crimes committed on or within its boundaries.

058-310—November 24, 1958

TAXATION

RENTAL OF NATIONAL GUARD ARMORIES—LICENSE AND
LICENSE TAXES—§§205.37, 205.68, 250.40-250.42; AND
548.03; CH. 548, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the armory board required to obtain an occupational license and pay the license tax, imposed by §205.37, F. S., when it consistently rents an armory for a consideration for the purpose of holding boxing and wrestling matches, and other forms of entertainment, open to the public and for which an admission fee is charged?

National guard armories in this state are, under the terms of §§250.40-250.42, F. S., state property under the supervision and control of the state armory board. The rental of such armories by the state armory board, or under the direction or authority of the said board, is a rental by the state. In this connection the armory board is authorized and empowered to adopt and prescribe rules for the government and management of armories under its supervision and control. Under §250.41, "any and all moneys accruing to the armory board from the operation and management of properties hereinabove mentioned are hereby appropriated for the maintenance of state properties under control of the armory board." This statute would seem to include funds derived from renting armories or portions thereof. Under §250.42, F. S., the armory board is authorized to lease lands under its supervision and control "which are in the opinion of said board not required for military uses."

Chapter 548, F. S., regulates boxing and boxing exhibitions in this state; §548.03 thereof, declaring that boxing exhibitions held by or under the auspices of "companies or detachments of the Florida national guard are not prohibited although an admission fee may be charged." This statutory provision seems to be authority for the putting on or sponsoring of boxing exhibitions and other entertainment by national guard companies or detachments and charging an admission fee therefor.

Section 205.37, F. S., provides that "every person who operates for profit any place where dancing is permitted or entertainment, such as variety programs or exhibitions, is provided for a charge shall pay a license tax of one hundred dollars. The license required by this section shall be in addition to any other license required by law Provided, further, that this section shall not apply to entertainment given for charitable purposes, the proceeds of

which are given to local charities" The term "person," as used in the above statute, under the definition contained in §205.68, F. S., is to "be construed to mean either person, firm, partnership, corporation, association, executor, administrator, trustee or other legal entity, whether singular or plural, masculine or feminine, as the context may require." This definition does not seem to extend to the state and its agencies. "Neither the government, whether federal or state, nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested" (82 C. J. S. 554, §317). It seems clear that §205.37, above mentioned, has no application to the state armory board or the armories themselves.

The above stated question is, therefore, answered in the negative. It does not seem that companies and detachments of the national guard would be within the statute either, especially where the proceeds of the entertainment are used for the benefit of such companies or detachments, or for the benefit of the national guard itself. Whether persons renting armory space from the armory board or its agent and putting on programs or entertainment are required to obtain licenses and pay the license tax imposed by said §205.37 is not within the question here considered.

058-311—November 24, 1958

PUBLIC HEALTH

AUTHORITY OF MOSQUITO CONTROL DISTRICTS—WORKS OUTSIDE OF DISTRICT BOUNDARIES—CH. 390, §§390.16 AND 381.121, F. S.

To: *Naples Mosquito Control District, Naples*

QUESTIONS:

1. May a mosquito control district, existing under Ch. 390, F. S., perform control work beyond its boundaries when necessary for proper and effective arthropod control within the district?
2. May the state board of health establish and operate arthropod control works beyond the boundaries of a mosquito control district when deemed necessary for the effective control of arthropods within the district?

Chapter 390, F. S., provides for the establishment of arthropod control districts by boards of county commissioners, upon petition by freeholders. Such a district may include all or any part of the county. The boundaries of the Naples mosquito control district conform substantially to the boundaries of the city of Naples. Mosquito control districts, established under said Ch. 390, have power and authority to "do any and all works and things necessary for the control and elimination of mosquitoes in said district" including the "construction of canals, ditches, drains, dikes, fills and other necessary works . . . and may also employ oils and chemicals and all other means and methods, and do any and all things necessary to eliminate mosquitoes from the territory of said district" (§390.16, F. S.).

Unless outside hazards or conditions hinder arthropod control within the district and prevent effective operation of the works of the district, no outside control works would be justified or authorized; only upon an official determination by the district board that

its arthropod control works are being seriously hampered and its effectiveness materially hindered does the question of its power and authority beyond district boundaries arise. If such hazards exist they would seem to be either (1) drainage hazards which render the works of the district ineffective within the district because of the failure of surface waters to drain off, leaving them within the district as breeding grounds, or (2) hazards, in the nature of breeding grounds, located beyond the boundaries of the district, from which arthropods invade the area forming the control district. The former may well be caused by general drainage problems, or it may be local and readily subject to correction by additional drainage beyond the boundaries of the district; the latter may stem from the failure to enclose within the district sufficient area to make control effective.

We find no answer to the problem from cases directly involving mosquito control districts; however, the problem seems to be one of health and public welfare and may be compared to the construction and maintenance of municipal works for a like purpose. It is stated in 37 Am. Jur. 736, §122, that "the practical necessities of municipal administration have compelled the courts to recognize that a municipality cannot be a self-contained unit, but must be permitted to go beyond its boundaries, so that the rule has been announced that when a power granted to a municipal corporation cannot be exercised without going outside of the corporate limits, the requisite authority to do so will be implied." In 63 C. J. S. 695, §1059, it is also stated that "the power to construct and maintain sewers beyond municipal limits has been held to be implied from a general power to construct sewers and drains and to do all acts necessary for the promotion of health, and to be indispensably necessary to carry into effect the express powers granted by statute to open and construct sewers and drains and keep them in order. So, a municipality may have power, under a general welfare provision, to construct a ditch to carry off surface water, although partly outside the town." In 28 C. J. S. 258, §12, it is stated that a drainage district has such powers "as are necessarily implied or incident to those expressly granted and which are indispensable to the district to carry out its declared objects, purposes and express powers." See also Annotations in 7 Ann. Cas. 522 and 61 L. R. A. 690. A municipality "is limited to the exercise of such powers as are expressly granted to it by the state, or as are necessarily and fairly implied in or incident to the powers expressly granted" (*Miami Water Works Local v. City of Miami*, 157 Fla. 445, 26 So. 2d 194, text 197). See also 3 Dillon Municipal Corp., 5th Ed., p. 2102 and authorities there cited.

Sections 381.421, et seq., F. S., authorize the use of state funds to aid counties, districts and municipalities in arthropod control work, as well as state supplies, equipment and machinery, and regulate the use of such funds, equipment and supplies by such counties, districts and municipalities. We find nothing in these statutes authorizing the separate use of state funds for arthropod control except in cooperation with counties, districts and municipalities. Funds appropriated by the legislature for arthropod control may be used, in connection with local funds, for sanitary land fills, drainage, diking, and filling of arthropod breeding areas, as well as the purchase of equipment and supplies. The legislature appropriated, for the current biennium, the total sum of \$3,500,000 to the state board of health to be used as grants to local agencies (counties, districts

and municipalities) to aid in their arthropod control. We find nothing in either §§381.421, et seq., F. S., or the current general appropriations act, providing funds for separate arthropod control by the state board of health. Neither do we find any authority in the state board of health to act as agent for any county, district or municipality, in administering arthropod control work either by itself or through agents. Even should such an authority be admitted to be in the state board of health it would be limited to the authority of the county, district or municipality in the same connection.

In the light of the above and foregoing the 1st question is answered in the affirmative, conditioned, however, that work done beyond district boundaries be merely and only for the purpose of making effective the works within the district and that the outside works may never become the primary works and the works within the district the secondary works. Such works outside of district boundaries must be indispensable to the district in order to carry out the objects, purposes and powers vested in it by Ch. 390, F. S. The 2nd question is answered in the negative, except that the Board of Health may act in a supervisory capacity as to the manner of the work to be performed.

058-312—November 25, 1958

PUBLIC LANDS AND PROPERTY

BULKHEAD LINES FIXED BY PRIVATE PARTIES—CH. 57-362, LAWS OF FLORIDA (§§253.122-253.0013, F. S.)

To: *Van H. Ferguson, Director, Trustees of the Internal Improvement Fund, Tallahassee*

QUESTIONS:

1. Are bulkhead lines fixed by private individuals long prior to the passage of Ch. 57-362, 1957, subject to change by any procedures under the 1957 act or by subsequent replatting of the land in accordance with the plat laws?
2. Does a law passed to extinguish restrictive covenants running with land operate to extinguish bulkhead lines fixed by a riparian upland owner and running with the upland title?

In answering your specific questions, I assume the "bulkhead line" to which you refer is actually a restrictive covenant in a deed or recorded plat by which the grantees in a subdivision covenant not to fill beyond a certain point in the navigable waters fronting their uplands. No doubt this type of covenant was placed of record to prevent an upland owner from extending his upland under the provisions of the Butler act to the detriment of the subdivision. I do not have before me the instruments containing the specific covenants and it is therefore impossible to pass upon their legal effect. However, I do not feel that such a determination is necessary in order to answer your specific questions and I will therefore proceed, assuming the legality of the provisions in these answers.

AS TO QUESTION 1:

Chapter 57-362, 1957, which is included in the Florida Statutes as a part of Ch. 253, provides that prior to any filling of submerged lands a bulkhead line shall be fixed by the local authority charged

with such responsibility, to be approved by the trustees of the internal improvement fund. When the line has been set in the submerged lands, no fill operations will be permitted beyond that point. You will note that the provisions of §253.122, F. S., make the bulkhead line the "line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed." The mere fact that a bulkhead line has been set does not necessarily imply that an upland owner may fill to such line.

Section 253.122, F. S., provides the method by which a bulkhead line may be fixed. It also provides for the agencies authorized to fix such lines. These agencies are the board of county commissioners, the local municipal authority, the trustees of the internal improvement fund, or a special agency created by statute for this purpose. (See §253.128, F. S.) Section 253.122, F. S., also provides for the acceptance of bulkhead lines which had been fixed by municipalities under statutory authority prior to the passage of Ch. 57-362, 1957. I find no provision in the bulkhead act or any other Florida law which recognizes a line fixed by private parties as a legal bulkhead line. While the line fixed pursuant to covenant may be binding upon the upland owner, I do not feel that it is a proper line which would permit filling under §253.123, F. S., which requires that a bulkhead line be fixed prior to the issuance of any fill permits.

It is therefore my opinion the covenant does not amount to a bulkhead line under the provisions of Ch. 57-362, 1957.

Question 1 is answered accordingly.

AS TO QUESTION 2:

The answer to question 1 above precludes the necessity of answering question 2.

058-313—November 26, 1958

COURTS

EXPERT WITNESSES BEFORE GRAND JURIES AND STATE ATTORNEYS; COMPENSATION, ETC.—§§10 AND 14, D. R., §9, ART. XVI, STATE CONST.; §§27.04, 40.29, 90.14, 90.23, 90.231, 917.01-917.03, 932.17, 932.20, 932.30, AND 932.33, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. May expert witnesses, subpoenaed by the state to testify before grand juries and state attorneys concerning criminal law violations and other matters, be paid witness fees in excess of the witness fees allowed by general statutes?

2. If the 1st question is answered in the negative, what is the effect of court orders for the payment of fees in excess of the witness fees allowed by general law?

Grand juries and state attorneys, under §10 of the Declaration of Rights of the Florida constitution, may investigate violations of Florida's criminal statutes and laws and, in proper cases, return indictments or informations against violators. Under §14 of the said Declaration of Rights, costs may not be assessed against a

defendant in a criminal proceeding "except after conviction, on a final trial." Under §9, Art. XVI, of the Florida constitution, "in all criminal cases *prosecuted in the name of the state* when the defendant is insolvent or discharged, the legal costs and expenses including the fees of officers, shall be paid by the counties where the crime is committed" (Emphasis supplied.)

Provision is made in §§27.04, 932.17 and 932.28, F. S., for compulsory attendance of witnesses before grand juries and state attorneys in connection with their investigations of crime and violations of the criminal laws of this state. "In courts having civil and criminal jurisdiction, except courts of county judges and justices of the peace, the pay and mileage of witnesses in criminal cases shall be the same and shall be paid in the same manner as in civil cases in the same court" (§932.33, F. S.). "Witnesses in all cases, civil and criminal, in the circuit courts, county courts, county judges courts, criminal courts of record, . . . shall receive for each day's actual attendance three dollars," plus mileage (§90.14, F. S.). Provision is made in §§90.23 and 90.231, F. S., for the use of expert witnesses in civil cases, to be paid as therein provided. Sections 917.01, 917.02 and 917.03, F. S., make provision for the use of expert witnesses in inquests for the determination of the mental condition of the defendant in criminal cases, either before or during the trial. It is clear from these sections that a proceeding subsequent to the return of an indictment or information charging crime is contemplated by the statutes. Under §932.30, F. S., expert witnesses may be called "when it shall be made to appear at the trial of any person in this state for felony" that such person may not be mentally competent.

From the above and foregoing we must conclude that the costs of criminal prosecution in this state is paid (1) by the county as to the actual trial of the cause, that is the proceedings had after the return of an indictment or information, and (2) by the state up to the finding and filing of an information or indictment charging the commission of a crime. Witnesses called to testify before the grand jury, or before the state attorney when investigating crime and determining whether an information should be filed or not, are to be paid by the state; witnesses who testify at the trial are to be paid by the county. From this we conclude that there is no statute or law in this state providing additional compensation for expert witnesses appearing and testifying before grand juries and state attorneys, when making investigations under §10 of the Declaration of Rights of the Florida constitution, as to the commission of crime and determining whether or not indictments or informations should be made and filed.

"The generally accepted American rule is that in the absence of statute an expert stands the same as any other witness and may be compelled to testify without being paid specially for his testimony as for a professional opinion, although his knowledge of the facts may have been acquired through scientific study and professional practice, but that he cannot be required, without added compensation, to make special examination of, or engage in experiments concerning, the matter at hand, or undertake any other operations requiring skill and professional training, in order to qualify himself specially to testify in the particular case" (58 Am. Jur. 503-504, §880; see also 97 C. J. S. 429, §42; 4 Wigmore on Evidence, 2985, §2203; and 3 Jones Commentaries on Evidence, 2415, §1320). In

Bulmer v. Strawn, Fla., 53 So. 2d 315, an expert witness was allowed the regular witness fee provided by §90.14; although it was contended that he was an expert witness within the purview of §§90.23 and 90.231, F. S. The statutes, although mentioned by the court, were not discussed in detail.

In this state a "grand jury is an inquisitorial body organized and acting under and by virtue of the state laws. It can bring a charge by way of indictment, but it cannot convict or punish." (*Skipper v. Schumacher*, 124 Fla. 384, 169 So. 58, text 63 and 64). Its actions are *ex parte*; its findings are neither a verdict nor a judgment (*Reed v. State*, 94 Fla. 32, 113 So. 630, and *Lake v. State*, 100 Fla. 373, 129 So. 827). Proceedings before a grand jury constitute an inquisition but not a trial (38 C. J. S. 980, §1). The proceedings mentioned in §§917.01, 917.02, 917.03 and 932.20, F. S., are proceedings after indictment, not during the inquisition from which may have issued an indictment or information. They have no application to witnesses appearing before the grand jury or the state attorney in connection with inquisitions made by them pursuant to their powers under §10 of the Declaration of Rights of the Florida constitution.

Statutory and constitutional provisions relating to the jurisdiction and powers of the grand jury, and the state attorney, in connection with their investigation of crime and the returning of informations and indictments, relate to criminal cases prosecuted in the name of the state, and not to investigations made by the grand jury and state attorney to determine whether the criminal statutes and laws of this state have been violated. Such investigations do not become criminal cases until informations or indictments have been returned and filed. Witness fees for witnesses who appear before the grand jury and the state attorney, in connection with their investigations of crime in this state, are costs and expenses of the state and not the county. Subsequent expenses are expenses of the county. Machinery for obtaining state funds for the purpose of paying witnesses appearing before the grand jury and before state attorneys is set out in §40.29, F. S., and no provision is made therein, or in any other statute of this state, for the payment of additional compensation to expert witnesses appearing before the grand jury or the state attorney. Funds for §40.29 are made available by the biennial appropriations acts.

Our examination of state budget commission reports to the last several sessions of the legislature, as well as the general appropriations acts, reveals nothing making specific provision for expert witness fees for witnesses appearing before the grand juries and state attorneys in connection with their investigations of crime in this state. We must conclude that no provision is made in the statutes and laws of Florida, including the current general appropriations act, for the payment of additional compensation to expert witnesses appearing before grand juries and state attorneys. The 1st question, under the present state of the statutes and laws of Florida, must be answered in the negative. This brings us to a consideration of the 2nd question.

The 2nd question raises the question of the jurisdiction and power of a criminal court or its judge to fix and determine the fees and compensation of witnesses appearing before the grand jury or during the trial of cases before it, especially where there may be a dispute as to the amount due such witness, especially a witness

before the grand jury. "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed, is regarded as binding in every other court" (*Malone v. Meres*, 91 Fla. 709, 109 So. 677, text 683, and *Harvey v. City of St. Petersburg*, 138 Fla. 597, 189 So. 861, text 865; and see also *Thomas v. State*, 102 Fla. 188, 135 So. 822, text 823; *Myers v. Harkins*, 102 Fla. 577, 136 So. 382, text 386; *Childs v. Boots*, 112 Fla. 277, 152 So. 212, text 213; *Sparks v. Ewing*, 120 Fla. 520, 163 So. 112, text 114; 50 C. J. S. 40, §618; 30 Am. Jur. 901, §148). A party may not refuse to comply with the mandate of a judgment on the ground that it is erroneous (31 Am. Jur. 355, §865) and such an erroneous judgment may be enforced (*Griffin v. Mitchell*, 197 Ark. 1175, 127 S. W. 2d 640). A void judgment is binding on no one and may be stricken upon motion at any time; but a voidable one is binding until set aside in some proper proceeding, usually to be brought within the time allowed for appeal (*Re. Begg's Estate*, 152 Fla. 277, 12 So. 2d 115, text 116). This brings us to the question of the validity of an order of a circuit court adjudging and allowing additional compensation to an expert witness before the grand jury of the state attorney in connection with their investigation of crime.

Where provided by statute costs in litigation may be taxed against the state or county (20 C. J. S. 699 and 701, §§456 and 457). "Error in allowing items not properly taxed (as costs) is not an excess of jurisdiction" (20 C. J. S. 692, §452). An execution should not be quashed on account of some misconception by the clerk in including some improper items in the judgment (*Warrensburg v. Simpson*, 22 Mo. App. 695). The cases of *Buckman v. Alexander*, 24 Fla. 46, 3 So. 817 and *De Soto County Commissioners v. Howell*, 51 Fla. 160, 40 So. 192, indicate that the circuit court of this state had power to fix the amount of the compensation of witnesses in criminal cases, whose fees are to be paid from state funds; however, it further appears that the court may not, when the costs are payable by the state, direct the method of payment or direct execution for their collection. "The state will pay them in such way as itself prescribes" (*Buckman v. Alexander*, *supra*). Should a writ of mandamus be brought for the collection of the judgment for costs, it seems reasonable to think that the court, in the mandamus action, would be bound by the adjudication of the criminal court (unless want of jurisdiction could be shown) unless and until corrected, set aside or reversed. Further, if there be no appropriation for the payment of costs by the state, there would seem to be no authority for the payment of the judgment, and mandamus would not lie.

Although the above Florida cases involved witness fees generally, and not expert witness fees, the applicable principles would seem to be the same in either case. We feel that the state would be bound by such an adjudication of fees and costs, as to the amount payable, unless and until set aside or reversed on a direct attack. The question on "remedies to enforce payment" of witness fees is discussed in 97 C. J. S. 435-436, §46, to which reference is made; see also our opinion 056-313, of Oct. 30, 1956. Although the force and effect of an order allowing expert witness fees to witnesses appearing before the grand jury or the state attorney, in connection with criminal investigations, is not definite and clear, there is the possibility that such an order may be binding on the state and its finance officers unless moved against in due course and within the

time allowed for a review thereof. These observations answer the 2nd question as well as the same may be answered by this office.

It is our suggestion that copies of this opinion be furnished each of the circuit judges and clerks of the circuit court throughout the state, with instructions that the state comptroller be advised immediately of orders allowing expert witness fees to witnesses appearing before the grand jury or state attorney in connection with criminal investigations. Should such an order be made we feel that, under the present status of the law in this state, the state comptroller or the attorney general, or both of them, should seek a review of the same in order to settle the law in the state upon the question.

058-314—November 26, 1958

COMMON CARRIERS AND OTHER REGULATED UTILITIES

SPECIAL OFFICERS FOR AIRLINES, APPOINTMENT BY GOVERNOR—CH. 354, §354.01, F. S.

To: LeRoy Collins, Governor, Tallahassee

QUESTION:

May special officers for airlines be appointed under the provisions of Ch. 354, F. S.?

Section 354.01, F. S., provides:

Upon the application of any railroad, express company, or other common carrier, doing business in this state, the governor shall appoint one or more special officers for the protection and safety of such carriers, their passengers and employees, and the property of such carriers, passengers and employees.

It is said in 6 American Jurisprudence, at p. 30:

There can be no doubt, under the general law of common carriers, that those air lines and aircraft owners engaged in the passenger service on regular schedules on definite routes, who solicit the patronage of the traveling public, advertise schedules for routes, times of leaving, and rates of fare, and make the usual stipulation as to baggage, are common carriers by air, and charged with liability as such

To the same effect is *Kasanof v. Embry-Riddle Co.* (1946) 157 Fla. 677, 26 So. 2nd 889.

It is my opinion, therefore, that special officers for airlines may be appointed under the provisions of Ch. 354, F. S.

058-315—November 26, 1958

COURTS

JUVENILE COURT—AMOUNT OF WITNESS' FEES—§12, ART. V, STATE CONST.—§§39.01(10), 39.19, 90.14, 90.15, 90.23, 90.231 AND 932.33, F. S.

To: John Germany, Assistant County Attorney, Tampa

QUESTIONS:

1. What amount of money may be paid as witness fees to witnesses in the juvenile court of Hillsborough county?

2. What amount of money may be paid as witness fees to expert witnesses in the juvenile court of Hillsborough county?

Section 39.19, F. S., provides, among other things, as follows:

(1) In all proceedings under this chapter except those proceedings held before the judge in the capacity of committing magistrate, no court fees shall be charged against, and no witness fees shall be allowed to, any party to a petition or any parent or legal custodian or child named in a summons. *Other witnesses shall be paid the witness fees fixed by law, out of funds of the county appropriated for that purpose and not out of the juvenile court fund.*

(2) In proceedings before the judge in the capacity of committing magistrate, *the fees provided by law shall be paid to witnesses*, and for service of process and other functions performed by the sheriff, out of county funds appropriated for that purpose and not out of the juvenile court fund. (Emphasis supplied.)

We have examined the several statutes providing for witness fees and conclude that the reference to "witness fees fixed by law" was to §90.14, F. S. Whether or not the "witness fees fixed by law" mentioned in said §39.19 is limited to said §90.14 as of the date of the adoption of said §39.19 or includes amendments thereof, such as Ch. 29927, 1955, in turn depends upon whether the said reference in §39.19 is ambulatory or not.

The statute construed in *Williams v. State*, 100 Fla. 1570, 131 So. 864, provided that the "fees of constables shall be the same as are allowed sheriffs for like services," and the one construed in *State v. Harlee*, 100 Fla. 1562, 131 So. 866, provided that the "fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services," which statutes were held not to be ambulatory. See also *McLeod v. Santa Rosa County*, 116 Fla. 838, 157 So. 37. The reference in the statutes involved in cases in 131 So. 864 and 866 were to specific Statutes and not general references, as is the reference in said §39.19, so that they are not here controlling. We feel that the reference in said section is within that line of authorities reflected by the annotation in 168 A.L.R. 633-4, where references to a law generally is held to be ambulatory.

The witnesses referred to in §39.19, F. S., as "other witnesses" should be compensated as provided in §90.14, F. S., as amended by Ch. 29927, 1955. This answers your 1st question. (See A. G. O. 055-186 on p. 244, 1955-1956 Biennial Report of the Attorney General.)

Replying to your 2nd question, the generally accepted rule is that in the absence of statute an expert witness stands the same as any other witness and may be compelled to testify without being paid for his testimony as for a professional opinion, although his knowledge of the facts may have been acquired through scientific study and professional practice. (58 Am. Jur. 503, §880; see also 70 C.J.S. 75, §86; 4 Wigmore on Evidence, 2985, §2203; 3 Jones Commentaries on Evidence, 2415, §1320.)

Section 932.30, F. S., provides for expert witness fees in the trial of any person for a felony. Section 932.33, F. S., provides, among other things, as follows:

In courts having *civil and criminal* jurisdiction, except courts of county judges and justices of the peace, the pay and mileage of *witnesses in criminal cases* shall be the same and shall be *paid in the same manner as in civil cases in the same court*. . . . (Emphasis supplied.)

This section of the statutes refers to §§90.14 and 90.15, F. S., which fix the compensation of witnesses generally, and §§90.23 and 90.231, F. S., which provide that expert witnesses are entitled to commensurate fees to testify in civil actions.

A separate juvenile court for Hillsborough county has been established by Ch. 8061, special acts of 1919, as amended, the creation and jurisdiction of which was not repealed by Ch. 39, F. S.

In *Watson v. Rogers*, 86 So. 2d 645, 648, the supreme court of Florida held that the jurisdiction of the juvenile court as conferred by §50, Art. V., (now subsection 12), constitution of Florida, goes only to the matters that are essentially *delinquent or criminal* "unless the question of dependency enters the picture." (Emphasis supplied.)

Section 39.01(10), F. S., defines a dependent child as follows:

"Dependent child" means a child who, for any reason, is destitute, homeless, dependent upon the public for support, or has not proper parental support, maintenance, care, or guardianship; or who is neglected as to proper or necessary support or education as required by law, or as to medical, psychiatric, psychological or other care necessary for the well-being of the child; or who is abandoned by the child's parent or other custodian; or whose condition or environment are such as to injure or endanger the welfare of the child or the welfare of others; or whose home, by reason of neglect, cruelty or depravity, or other adverse condition, on the part of the parents, legal custodians, guardian or other person in whose care the child may be, is an unfit place for the child.

See 31 Am. Jur. 344, §94, which provides as follows:

Juvenile courts are generally given jurisdiction of prosecutions against adults upon charges of contributing to the delinquency or dependency of an infant, . . .

See also 31 Am. Jur. 304, §20, which provides:

With respect to a "dependent child," the purpose of juvenile court statutes is to provide for placement of the child in an approved family to become a member of that family where such child may receive as nearly as possible the care his natural parents should have given him. See also 31 Am. Jur. 306, §25, which provides:

. . . it is not the purpose of the statutes creating juvenile courts to provide additional courts for the punishment of crime. The purpose is to establish special tribunals having jurisdiction, within prescribed limits, of cases relating to the moral, physical, and mental well-being of children to the end that they may be directed away from paths of crime. . . .

In the light of the above authorities, unless there is a Florida statute providing for additional compensation to an expert witness appearing before a juvenile court, such witness may be paid only the usual compensation. However, our research indicates that there is sufficient civil jurisdiction of the juvenile court of Hillsborough

county to justify the payment of expert witness fees in the handling of civil cases, including dependency cases, as provided in §§90.23, 90.231 and 932.33, F. S.

Your 2nd question is answered accordingly.

058-316—December 2, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—QUADRICENTENNIAL COMMISSION
OF PENSACOLA—CH. 122, F. S. AND CH. 57-2043; §27,
ART. III AND §7, ART. XVI, STATE CONST.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the officers and employees of the quadricentennial commission of Pensacola, established by Ch. 57-2043, 1957, within the purview of the state and county officers and employees retirement system of this state?

State and county officers and employees, within the purview of Ch. 122, F. S., the state and county officers and employees retirement system of this state, "include all full-time officers or employees *who receive compensation for services rendered from state or county funds . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not; provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries . . .*"

Chapter 57-2043 created and established the quadricentennial commission of Pensacola which is, by said act, declared to be "a public body politic, exercising the public and essential governmental functions" set out in the act (§2). It may "require the use of services and facilities provided by the County Commissioners or the Commission or the Santa Rosa Island Authority for any of the foregoing at such reasonable charges as the County Commissioners or the Commission or the Santa Rosa Island Authority may fix . . ." (§2); "promote, sponsor and operate in Escambia County, Florida, a Quadricentennial celebration Commemoration of the 400th anniversary of the establishment of a Spanish colony in Pensacola, Florida" (§2). The quadricentennial board of five members, the governing board, is to be appointed by the governor for terms of four years each; this appears to have been an attempt to comply with §27, Art. III, and §7, Art. XVI, State Const., relating to state and county officers (§3). The board is required to "prepare an annual budget containing an estimate of receipts and disbursements for its fiscal year . . . and a separate budget for each facility operated by it," copies of which budgets are to be presented to the board of county commissioners for Escambia county and the contributing municipalities (§4); submit periodic reports to the said board of county commissioners and to contributing municipalities (§4). The obligations of the commission are payable from its income and are not binding upon the county or any contributing municipalities (§11). A copy of all audits of the affairs of the commission is required to be furnished the county commissioners and the con-

tributing municipalities (§12). The commission may, with the consent of the county or a municipality, act as agent for such county or municipality and bind it (§13). The commission may contract with similar commissions of adjoining counties in connection with its duties (§15); "all property and rights therein owned by the commission shall be deemed to be public property held and owned for a county purpose" and vests in the county upon dissolution of the commission unless otherwise provided (§16).

Chapter 57-2044 authorizes the use of county and municipal employees by the commission with county or municipal consent. Under Ch. 57-2047, Escambia county may "dedicate, convey or lease any of its property to the Commission, . . . contribute or donate money to the commission, . . . appropriate and budget funds in support and operation of the Commission in the accomplishment of the purposes for which it was created . . ." (§3) "The Board of County Commissioners of Escambia County, Florida, shall levy an ad valorem tax of one mill on each dollar of value of taxable property in Escambia county, each year for five consecutive years, commencing with the fiscal year of 1958-1959," the proceeds of which tax are to be contributed to the quadricentennial commission (§4). Chapter 57-2048 declares that "all the powers conferred upon the Quadricentennial Commission of Pensacola by law, and the exercise of such powers, or any of them, constitute and are county and public purposes." The city of Pensacola is also authorized to levy an ad valorem tax, the proceeds of which are to be used by the commission (Ch. 57-2075). The jurisdiction and authority of the commission over the actual site of the celebration is extensive and governmental in nature (Ch. 57-2043).

The legislature of 1919 (Ch. 7921) provided for a commission, designated as the Florida purchase centennial commission, consisting of five members named and appointed by the legislature in the act itself. The general powers of the said commission were in many ways like or similar to the powers of the quadricentennial commission of Pensacola aforesaid. The court, in *State v. Jones*, 79 Fla. 56, 84 So. 84, held the officers of the said Florida purchase centennial commission to be either state or county officers within the purview of §27, Art. III, and officers within the purview of §7, Art. XVI, State Const., and in violation thereof. The legislature in setting up the quadricentennial commission of Pensacola was careful to provide appointment of the commission by the governor (§27, Art. III) with four year terms (§7, Art. XVI) so as not to be within the scope of *State v. Jones*, supra.

We feel that the members of the quadricentennial commission of Pensacola are public officers, within the purview of *State v. Jones*, supra; Advisory Opinion, 153 Fla. 650, 15 So. 2d 765, text 766; *State v. Hurlbert*, 155 Fla. 531, 20 So. 2d 693, text 694; Advisory Opinion, Fla., 63 So. 2d 321, text 325. The said commission is not set up as a district; although it is given jurisdiction over the quadricentennial grounds, it is given no district powers such as the levy of taxes or assessments in the nature of taxes. Taxes for it are levied by Escambia county or by a contributing municipality. It seems to be an agency of either the state or of Escambia county, and its officers and employees are either state or county officers and employees. As Ch. 122, F. S., extends to both state and county employees, we do not deem it necessary that their exact status be determined for the purposes of Ch. 122, F. S.

The above stated question is, therefore, answered in the affirmative.

058-317—December 2, 1958

**REGULATION OF PROFESSIONS AND VOCATIONS
AUTHORITY OF CHIROPRACTIC EXAMINERS TO EXEMPT
LICENSE HOLDERS OVER SIXTY-FIVE YEARS
OF AGE—§460.27, F. S.**

To: Daniel K. Kirk, Secretary-Treasurer, State Board of Chiropractic Examiners, Jacksonville

QUESTIONS:

1. Does the state board of chiropractic examiners have the authority to exempt license holders from the educational work required by §460.27, F. S., if said license holders are 65 years old or older?

2. Does the board have the authority to exempt license holders from the educational work on any other grounds, such as retirement, poor health, physical handicaps or any similar cause?

Section 460.27, F. S., provides, among other things, as follows:

All persons who are now or may hereafter be regularly licensed to practice chiropractic in the state shall, on or before the first day of October, annually hereafter renew his or her license and pay a renewal fee of five dollars each year to the state board of chiropractic examiners; provided that, in addition to the payment of such renewal fee, each licensee so applying for a license renewal shall furnish to said board satisfactory evidence that he or she has attended the two-day educational program as conducted by the Florida association of chiropractors, or its equivalent as approved by the state board of chiropractic examiners of the state, in the year preceding each such application for a renewal. The only exception to the above shall be in the event an applicant is, for physical or mental reasons, totally incapacitated from carrying on his active practice for the entire year preceding October 1, of the year in which application for renewal is made. (Emphasis supplied.)

In view of the foregoing your 1st question is answered in the negative.

Replying to your 2nd question, it appears that §460.27, F. S., was amended by Ch. 25400, 1949, creating an exception in cases of total physical or mental incapacity to practice for the entire year preceding Oct. 1 of the year in which application for renewal is made. Section 2 of the amendatory act of 1949 repealed all conflicting laws or parts of laws.

Your 2nd question is answered accordingly.

058-318—December 2, 1958

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

PUGILISTIC EXHIBITIONS—EXHIBITION BETWEEN MAN AND BULL PROHIBITED—§§548.01 AND 548.03, F. S.

To: Paul B. Johnson, County Solicitor, Tampa

QUESTION:

Is an exhibition between a man and a bull without the use of swords or any other dangerous or lethal weapons violative of the provisions of Ch. 548, F. S.?

Since receipt of your letters I have received copy of an opinion under date of Nov. 25, 1958, prepared by Ralph A. Marsicano, city attorney, Tampa, to Nick C. Nuccio, mayor of Tampa, which I believe is a correct statement of the applicable law dealing with your question. Mr. Marsicano in his letter advises the mayor in part as follows:

Section 548.01, F. S., provides:

"Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, *or in an exhibition or fight between man and bull*, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years."

Section 548.03 exempts only pugilistic exhibitions between persons when conducted by the American Legion, Florida National Guard, and certain other organizations, including the Circulo Cubano, a club, described as a charitable organization. There is no exemption whatsoever of any contest between man and bull or other animal.

The Statute in question was enacted in 1895 as Chapter 4402, General Laws of Florida. The title to the original Act is as follows: "An Act to Prohibit Fighting, Pugilistic Exhibitions, and Kindred Offenses." It will be noted from this title of the original Act, that the above quoted section from the Florida Statutes, was never intended to relate solely to pugilistic exhibitions, but "fighting" and "kindred offenses" are separate categories from pugilistic exhibitions. Therefore it is the opinion of the writer that the category in the quoted section to-wit, "an exhibition or fight between man and bull" is an entirely separate category from that of pugilism and is certainly broad enough to embrace the contemplated activity which it has been proposed to exhibit in the City of Tampa.

There does not appear to be any decisions of the Florida Supreme Court interpreting the Statute but the respectable authority, Florida Jurisprudence, Page 270, interprets the Statute, to-wit:

"Various acts relating to animals are declared to be criminal offenses, such as engaging in an exhibition or fight between man and bull or between man and any other animal

for money or anything of value or for which an admission fee is charged"

Mr. Marsicano also refers to the case of *State ex rel Attorney General v. Canty et al* (Missouri) 1907, 105 S. W. 1078. He points out that said case involved a similar exhibition to the one proposed in your question which was attempted "in the City of St. Louis and the Supreme Court of Missouri reversed a Circuit Court which had refused to enjoin a virtually identical exhibition, on the ground that the same constituted a public nuisance. The facts in that case are taken from the opinion, to-wit:

"That performance was as follows: The first part of it was a parade around the arena. The bullfighters went in dressed in Spanish costumes, leading horses, and, after retiring, one of the respondents opened a gate and let in a bull, and he came in on the run and jump. There were several men standing around, dressed for the occasion, called 'matadors,' with red cloaks or capes. That as soon as the bull entered he made for one of those men, and the man threw his cloak in his face and jumped away, and then every one of them went through the same performance. That after the bull and men had completed that part of the performance, one of the men would take a cane and go through the form of killing it, as with a sword in a Spanish or Mexican arena, but the bull was not in fact stabbed, killed, or injured by that act. The action of the matadors greatly excited and maddened the bull, and he would rush around the arena after those people, and attempted to gore them, and he caught one of them and smashed him with his head and horns against the side of the arena."

The Supreme Court in its opinion held:

"According to the evidence in this case, there can be no doubt but what the bullfight, in so far as the bulls were concerned, were genuine fighters, and partook of the ferocity and brutality which has ever characterized them in Spain and Mexico. * * * While it is true the evidence discloses that the matadors did not use the sword, as is the practice in Spain and Mexico in such fights, nor inflict injury or death upon the bulls, yet that very fact made it more hazardous and dangerous for the matadors.

* * * * *

"So we are thoroughly satisfied, from both reason and authority, that in a case of this character, where the nuisance sought to be enjoined is itself, and in its very nature is, both public and at the same time injurious to the public safety and good morals, a court of equity has full power and jurisdiction to abate the existing nuisance, and to perpetually enjoin the owners of the property from maintaining or conducting the same in the future."

I point out that our jurisdiction has produced no decision construing the statute in relation to the situation reflected in your question.

It had been my original impression that exhibitions of this kind were permissible having in mind pugilistic exhibitions and encounters between men and animals in rodeos and alligator wrestling matches which are recognized in our state as not being violative of the statute. However, in the light of the results of legal research

upon the specific subject of bullfighting exhibitions, I feel constrained to advise you that such exhibitions of fights or encounters between men and bulls should not be undertaken unless a test case, possibly declaratory judgment proceedings, is first made and a favorable decision therein obtained; or the matter could be submitted to the 1959 legislature for determination by proposing legislation to sanction such exhibitions similarly as in the case of pugilistic exhibitions.

Considered in the light of the legal research indicated above the answer to your question is in the affirmative.

058-319—December 2, 1958

MILITARY CODE AND RELATED MATTERS

**CIVIL DEFENSE—CONTRIBUTIONS TO CIVIL DEFENSE,
PURCHASE OF EQUIPMENT FOR FIRE PROTECTION**

UNIT—CH. 129, §§252.09(1), (2)(a), 252.19

AND 129.06(2)(d), F. S.

To: Hiram Faver, Clerk and Auditor, St. Johns County, St. Augustine

QUESTION:

What is the proper procedure to be used in handling funds contributed to the county for the purchase of a civil defense fire protection unit?

Under the civil defense act each county is required to establish a civil defense council. The council consists of the county commissioners and such other elective public officials as may be designated by them. Each county is also required to establish a county local organization and the council is authorized to appoint a director to have charge of the administration and operation of the county organization, subject to the direction and control of the county council (§252.09(1), F. S.).

The counties acting through their local civil defense council are empowered to accept offers of services, equipment, supplies, material or funds by way of gift, grant or loan for purposes of civil defense (§252.19, F. S.). The counties are empowered to spend money, make contracts, obtain and distribute property, provide for health, and safety of persons and property, and direct and coordinate the development of civil defense plans and programs (§252.09(2)(a), F. S.). Although the civil defense act is silent as to any specific procedures to be followed by the county in budgeting and spending money for such purposes, moneys properly spent for civil defense are clearly spent for a county purpose. It is, therefore, my opinion that the provisions of the county budget law, Ch. 129, F. S., are applicable to this situation.

Further, I would call your attention to §129.06(2)(d), F. S., which provides that a county budget may be amended in such situations, in the following manner:

(d) A receipt of a nature from a source not anticipated in the budget and received for a particular purpose, including but not limited to grants, donations, gifts, or reimbursements for damages, may, by resolution of the board spread on its minutes, be appropriated and expended for that purpose, in addition to the appropriations and expenditures provided for in the budget. Such receipts and

appropriations shall be added to the budget of the proper fund. (Emphasis supplied.)

This would seem to be the proper and appropriate manner for the handling of funds *donated* to the county for the specific purpose of civil defense.

As the civil defense act also provides that the counties may obtain and distribute property in behalf of civil defense, this indicates that it would also be proper for the potential donor of funds to purchase the fire equipment directly and present it to the county. The commission could then distribute the equipment to the local organization for use in civil defense.

058-320—December 3, 1958

MOTOR VEHICLES

FINANCIAL RESPONSIBILITY DIVISION — §§324.121, 324.021(7), (10), 324.051(2), 324.131 AND 324.081, F. S.

To: J. Edwin Larson, Insurance Commissioner, Tallahassee

QUESTIONS:

1. When a person furnishes satisfactory evidence of being properly insured at the time he was involved in a motor vehicle accident can his driving and registration privileges be suspended thereafter under §324.121, F. S., if a judgment is rendered against him as a result of the accident in an amount in excess of the \$10/20/5 limits of liability required by §324.021(7), F. S.?

2. When a judgment is rendered by a court of competent jurisdiction for property damage resulting from a motor vehicle accident in an amount less than \$50 are we authorized to suspend the driving and registration privileges of the judgment debtor under §324.121, F. S., if it is established that the total property damage is less than \$50?

3. When an uninsured resident of Florida is involved in a motor vehicle accident in another state as a result of which a judgment is rendered against him by a court of competent jurisdiction in the sister state, are we authorized to suspend the driving and registration privileges of the Florida resident under §324.121, F. S., if we do not have a reciprocal agreement with the sister state?

AS TO QUESTION 1:

Section 324.121, F. S., provides that the insurance commissioner shall, upon receipt of a certified copy of a "judgment," suspend the license and registration of the person against whom the judgment was rendered. ("Judgment" is defined in §324.021(10), F. S.) Section 324.131, F. S., provides that the license and registration shall remain suspended until the "judgment is stayed, satisfied in full or to the extent of the limits stated in §324.021(7). . . ." If a person is properly insured, his insurance will satisfy the judgment to the extent of the limits provided in §324.021(7), F. S. Accordingly, your 1st question is answered in the negative.

AS TO QUESTION 2:

Section 324.121, F. S., does not place any minimum limit upon the size of the judgment required to invoke the sanctions of said section. Nor does the definition of "judgment" in §324.021(10),

F. S., contain any such minimum. The only section in which the \$50 minimum is mentioned is §324.051(2), F. S. Said section requires that the commissioner shall suspend the licenses and registrations of those uninsured persons involved in a motor vehicle accident unless the total property damage is less than \$50. It will be noted that said section applies to all persons involved in a motor vehicle accident regardless of fault, which is the reason that a minimum limit is necessary.

When a judgment has been rendered against the *person at fault* and is not satisfied within 60 days, the sanctions of §324.121, F. S., should be imposed no matter how small the judgment. Your 2nd question is answered in the affirmative.

AS TO QUESTION 3:

"Judgment" as defined in §324.021(10), F. S., includes any judgment arising out of a motor vehicle accident "rendered by a court of competent jurisdiction of any state or of the United States, . . ." It would appear, therefore, that the "judgment" referred to in §324.121, F. S., includes judgments rendered in other states against Florida residents.

Section 324.081, F. S., provides that the commissioner may establish reciprocal agreements with other states and "pursuant to such agreements may suspend the license and registration of a resident of this state involved in an accident in another state." Succeeding provisions indicate that the agreements contemplated involve the revocation of licenses and registrations of uninsured motorists unless they put up security for damages for which they may be responsible. Section 324.081, F. S., does not appear to me to be a limitation upon §324.121, F. S., but appears to be supplementary. Your 3rd question is answered in the affirmative.

058-321—December 3, 1958

CORPORATIONS AND BUSINESS TRUSTS

FOREIGN CORPORATIONS—CONSTRUCTION OF TERM "TRANSACTIONING BUSINESS IN THIS STATE"

CH. 613, §613.11, F. S.

To: Gordon G. Oldham, Jr., State Attorney, Fifth Judicial Circuit,
Leesburg

QUESTION:

Is a particular foreign corporation doing business in this state within the meaning of Ch. 613, F. S., thereby transacting business without a permit, in violation of §613.11, F. S.?

Before analyzing the factual situation of this particular case, we must first define what is meant by the terminology "transact(ing) business in this state" within the meaning of Ch. 613, *supra*.

Section 8, Art. I, of the constitution of the U. S. provides that congress shall regulate all interstate and foreign commerce. The supreme court of the U. S. in interpreting this constitutional provision has consistently held that the regulation of a foreign corporation engaged exclusively in interstate or foreign commerce rests solely within the power of congress and statutes of the several states which attempt to regulate such foreign corporations are void and unconstitutional as repugnant to the federal constitution (Pem-

bina Consol. Silver Mining and Milling Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. Ct. 737; McCall v. Calif., 136 U. S. 104, 34 L. ed. 391, 10 S. Ct. 881; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 S. Ct. 851; Interstate Amusement Co. v. Albert, 239 U. S. 560, 60 L. ed. 439, 36 S. Ct. 168).

To give meaning to the terminology "transact business within this state" as set out in Ch. 613, *supra*, it must be interpreted so as to uphold the constitutionality of the statute. Within the meaning of the above-stated rule, the only interpretation that could be placed on the statute is that it was intended to regulate foreign corporations engaged exclusively in intrastate commerce or engaged in intrastate commerce in conjunction with other interstate and foreign commerce.

The question therefore becomes a factual one in determining whether the actions of this particular corporation in engaging in business in this state involves intrastate commerce or interstate commerce. The corporation in question appears to be incorporated under the laws of Oregon. It is engaged in the training of airline stewardesses and maintains schools in California and Illinois for this purpose. Prior to commencing actual school training, correspondence courses are carried on between the corporation and the trainee. Agents of the corporation appear to go throughout the U. S. into the several states eliciting business and obtaining applicants for the school. Based on the previous rulings of the U. S. supreme court, I am of the opinion that the foreign corporation in question was and is engaged in interstate rather than intrastate commerce and therefore, does not come within the provisions of Ch. 613, *supra*.

In *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 30 S. Ct. 481, the U. S. supreme court was called upon to determine the validity of a Kansas statute which required any foreign corporation seeking to do business in Kansas to make application to that state for permission to engage in business. Such application also required the payment of a \$25 fee and the filing of several other necessary documents. In that case, the corporation for profit was engaged in the promotion of an international correspondence school. Its home office was in Scranton, Pa. The corporation's business was conducted by preparing and publishing instruction papers, textbooks and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding, from time to time, of such publications and apparatus to students. In the conduct of its business, the company employed local or traveling agents whose duties were to procure and forward to the home office, from persons in a specified territory, on blanks furnished by the corporation, applications for scholarships in the corporation's school, and also to collect and forward to the company deferred payments on scholarships. In conformity with the contract that was entered into between the company and its students, the scholarship and instruction papers, textbooks and illustrative apparatus under each accepted application were sent by the company directly to the applicant and instruction was imparted by means of correspondence through the mails between the company at its home office and the applicant at his residence in another state.

In the *Pigg* case, the supreme court declared the Kansas statute, which was very similar to our Ch. 613, *supra*, to be unconstitutional as violating §8, Article I, of the U. S. Constitution and, in so doing,

held that the International Textbook Co. engaged in interstate commerce.

In light of the above-stated reasons, it is my opinion that the foreign corporation in question was and is engaged in interstate commerce; that it does not come within the provisions of Ch. 613, supra; and that your question must be answered in the negative.

It is to be noted that this opinion relates only to whether or not the foreign corporation in question is guilty of a criminal violation of the Florida Statutes and such opinion does not encompass the question of whether or not such foreign corporation could sue or be sued in the courts of this state. (See Annot. 38 A. L. R. 2d 747, 760-762.)

058-322—December 4, 1958

PUBLIC LANDS AND PROPERTY

STATE OIL AND GAS LEASES—CONTRACT OBLIGATIONS—
SALE OF SUBMERGED LANDS—§§253.06-253.11 (REPEALED),
253.12-253.14, 253.15 (REPEALED), 253.36-253.41, 253.47,
253.51, 253.61, 271.01, 377.22 AND 377.27, F. S.

To: *Van H. Ferguson, Director, Internal Improvement Fund, Tallahassee*

QUESTIONS:

1. What effect, if any, does the sale and conveyance of submerged sovereignty lands and the filling in and improvement of the same, for residential and business purposes, have upon oil and gas leases previously made by the state or its agency?

2. What effect, if any, does the extension of municipal corporate limits have upon oil and gas leases previously made by the state or its agency?

Oil and gas leases of sovereignty and public lands owned and held by the state or its agencies have been made pursuant to either §253.47, or §§253.51 to 253.61, F. S. Submerged sovereignty lands have been and may be sold under and pursuant to §§253.12, et seq., F. S., as well as §§253.36-253.41, F. S. Lands were also sold and conveyed in Dade, Monroe and Palm Beach counties under §§253.06-253.11, F. S., prior to their repeal by Ch. 57-362. Some submerged lands lying between the high watermark, along navigable salt or tidal waters were also filled in and improved pursuant to §271.01, F. S., prior to its repeal by Ch. 57-362, or maybe by Ch. 26776, 1951, (See *Duval Eng. and Constr. Co. v. Sales, Fla.*, 77 So. 2d 431, text 433). The right of upland owners to fill in submerged lands under this section was withdrawn by its repeal. Under said §271.01, no title vested in the upland owner until the submerged lands had been filled in or improved in accordance with the provisions of said section (*Stein v. Brown Properties, Fla.*, 104 So. 2d 495, text 499; *Hayes v. Bowman, Fla.*, 91 So. 2d 795, text 800).

Oil and gas leases made and delivered, by the state to the lessees, under the provisions of Florida Statutes, entitle the lessees to explore for oil and gas under the leased lands, including sovereignty water bottom lands, and to take and use such oil and gas as may be recovered by reason of such exploration and recovery operations; subject to applicable statutes and the state's royalty and other interests in accordance with the lease contracts. These

leases, between the state or its agencies and the lessees, are contracts. "Not only private contracts are protected from impairment by state laws, but also contracts made by a state with individuals and corporations, and also with other states." (12 Am. Jur. 30, §399). It is quite evident that the lessees under the said oil and gas leases acquired valuable property and other rights under and by reason of the said lease agreements, which may not be impaired by the state, except as to the extent reserved in the contract itself or in existing statutes applicable thereto.

The provisions of the lease contracts, and the statutes applicable thereto, as to the location and drilling of oil and gas wells, as well as the operation thereof if producers, are part of the contract protected by the federal constitution and the state constitution against impairment. The rights of the state and its agencies, the lessees, and the purchasers of submerged bottom lands subsequent to the making of the lease agreements must be determined from the contracts themselves, including applicable statutes and laws existing when the contracts were made and entered into, subject to the valid exercise of the police power. The rights of the parties may be impaired to the extent reserved by the lease agreements, including applicable statutes and laws. Based upon the above we must examine the contracts themselves. The following paragraph taken from one of the lease agreements seems applicable to the questions considered:

On what are commonly termed coastal and tide water areas, *no well shall be* (1) *begun nearer than two hundred feet from the ordinary high water mark of the shore, nor* (2) *for lake and river areas, nearer than fifty feet from the ordinary high water mark, without the written consent of the owner of adjoining upland; nor shall any well be begun within* (3) *one-eighth of a mile of the shore line in front of any village of five or more families; and* (4) *where the majority of the dwelling houses occupied by said families are each less than three hundred feet from another of such dwelling houses, without the written consent of the owners of the water front upland situated one-fourth of a mile each way from a line drawn from the well to the shore line at the nearest point; nor shall any well be begun* (5) *within the corporate limits of any municipality without the written consent of the governing authorities thereof. No well shall be begun* (6) *nearer than two hundred fifty feet from the right of way of any State Highway without the consent of Lessors. The inhibitions of this paragraph shall not apply where producing wells shall have been drilled on lands, not included in this lease, within two hundred fifty feet of the inhibited area. (Parenthesis and numerals 1 through 6 supplied.)*

Most, if not all, oil and gas lease agreements entered into by the state as grantor contain an identical, or substantially identical provision.

Section 253.61, F. S., prohibits the granting of oil and gas leases encumbering state lands, either upland or sovereignty bottom lands, within municipal corporate limits, or adjacent thereto, without municipal consent. This same section of the statutes prohibits the granting of such leases encumbering improved beaches (as therein defined) without county consent. However, a reading of this section indicates that it relates to the time of the making of the

lease and was not intended to invalidate a lease because of subsequent changes in the municipal boundary. The following phrase is used in this connection; no lease of the type covered by this law shall be "granted, sold or executed covering lands within the corporate limits of any municipality. . . ." Under §377.22, F. S., the board of conservation is granted power and authority, by rules and regulations, to prevent oil and gas wells "from being drilled, operated or produced in such a manner as to cause injury to neighboring leases or property . . . to prevent fires . . . to regulate the spacing of wells and to establish drilling units. . . ." Section 377.27 relates to the establishment of drilling units from two or more ownerships. Above §253.61 appears to speak as of the time of the entering into and making of the lease agreement; but §§377.22 and 377.27 relate to the time of the location and beginning of the drilling of the well.

The above provisions of the lease contracts appear to speak as of the time the drilling of an oil or gas well is begun, not as of the date of the lease agreement. These regulations and those contained in §§377.22 and 377.27, F. S., are part and parcel of the lease agreement and so far as they regulate the location and drilling of wells are not prohibited by the contract clauses of the state and federal constitutions. Any regulations made pursuant to these provisions will be applicable to property filled in or improved under §§253.06-253.11, or §§253.12-253.15, F. S., including the 1951 and 1957 amendments thereto, and extensions to municipal corporations.

Sales of lands under and pursuant to said §§253.06-253.15, F. S., subsequent to the making and delivery of the oil and gas leases in question, were made and the lands conveyed subject to the lessees' oil and gas rights under and pursuant to such leases. These leases were doubtless, by reason of the proper record of such leases in the public records of the respective counties, within the constructive knowledge of the purchasers of water bottom lands under said §§253.06-253.15, F. S., and no filling in or other action on the part of the purchasers or those claiming under them could divest the vested rights of the lessees under their lease agreements.

The 1st question is answered by stating the purchase of submerged land and subsequent filling in and improvement of the same, have no effect upon an oil and gas lease previously made. The leasehold rights continue to encumber the lands sold. However, the rules regulating drilling for oil and gas contained in the lease contracts, are applicable as of the date of the location and drilling of the well and not as of the date the lease was entered into. A lessee would therefore not be permitted to drill a well within the prohibited area of the filled and improved lands.

Question 1 is answered accordingly.

The 2nd question is answered by stating that extension of a municipality after the making of the lease will have no effect on the same, except insofar as the regulations for locating and drilling wells may be concerned, as hereinabove set out and discussed.

058-323—December 8, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM FOR SCHOOL TEACHERS—SECOND
RETIREMENT AFTER RE-EMPLOYMENT—§§238.09(1)(b),
(g) AND 238.07(7)(a), (b), F. S.**

To: *K. D. Farris, Director, Teachers' Retirement System, Tallahassee*

QUESTIONS:

1. Upon 2nd retirement after an additional term of service following a period of retirement, must a member repay the amount of his annuity received while retired, in order to comply with §238.09(1)(b) and (g), F. S.?

2. Upon 2nd retirement after an additional term of service following a period of retirement, may a member 60 years of age receive 2% of his average final compensation for his total years of service under the provisions of §238.07(7)(a) although he had previously received benefits under §238.07(7)(b), F. S.?

Section 238.09(1)(b), F. S., provides:

A member under plan E shall make contribution to the fund of six per cent of his earnable compensation; provided that a member employed at a state-supported institution of higher learning who is covered by the federal social security act, pursuant to an agreement between the state of Florida and the social security administration, shall make contributions of four per cent of his earnable compensation to the fund.

Section 238.09(1)(g), F. S., provides:

A member who elects to retire under plan E shall pay to the annuity savings fund prior to retirement or receive from the annuity savings fund, as the case may be, the difference between what his contributions, with accumulated interest, would have been under Plan E and the actual contributions of the member with accumulated interest.

Section 238.07(7)(a), F. S., provides:

At normal retirement age: two per cent of his average final compensation multiplied by the number of years of creditable service; provided that upon the service retirement of a member employed at a state-supported institution of higher learning who is covered by the federal social security act, pursuant to an agreement between the state of Florida and the social security administration, he shall receive a service retirement allowance for the period of his creditable service prior to the date he became covered by the federal social security act, as above set out, and he shall also receive one and one-half per cent of his average final compensation multiplied by the number of years of creditable service computed from the date he became covered by the federal social security act.

Section 238.07(7)(b), F. S., provides:

At early retirement age: Two per cent of his average final compensation multiplied by the number of years of creditable service and adjusted for actuarial equivalents based on completed months by which early retirement pre-

cedes normal retirement; provided that upon the service retirement of a member employed at a state-supported institution of higher learning who is covered by the federal social security act, pursuant to an agreement between the state of Florida and the social security administration, he shall receive a service retirement allowance for the period of his creditable service prior to the date he became covered by the federal social security act, as above set out, and he shall also receive one and one-half per cent of his average final compensation multiplied by the number of years of creditable service computed from the date he became covered by the federal social security act and adjusted for actuarial equivalents based on completed months by which early retirement precedes normal retirement.

The Florida Statutes herein cited and the Florida school statutes in general do not provide for the situation which is the subject of the above mentioned questions. In the absence of such authority, any interpretation of the statutes will have to be made from the apparent intent of the legislature in enacting retirement benefits for public school teachers.

It has been the policy of the Florida school system to reemploy certain teachers in time of need by virtue of an emergency or critical need for said teachers. Biennial Report of the Attorney General, 1951-1952, in opinion 051-352, indicates that the board, if the occasion should arise, could determine a matter such as this and by appropriate regulation, suspend the retirement of certain teachers and reemploy them, further, such suspensions and reemployment should entitle said teachers to receive credit for additional service.

In reaffirming and extending this position, I am of the opinion that in the instant problem, the reemployment should be considered only as a temporary interruption of the teacher's vested retirement status, which status is not terminated, but merely rescinded to allow said teacher to fill an important and perhaps crucial need. When this need has been fulfilled and the teacher returns to retirement status, he should return under the existing circumstances and conditions at the time of leaving said retirement and merely resume his retirement, not begin a new and separate period of retirement, except that the additional service rendered by the teacher should be credited to his total service and the increase of the emoluments of such additional service should be computed and added thereto.

Therefore, as to question 1, I am of the opinion that such a member is not required to repay the amount of his annuity, which he received while retired, so as to comply with §238.09(1)(b) and (g), F. S., since he is not beginning retirement as contemplated by these provisions he is merely continuing his initial period of retirement which began at age 55.

As to question 2, I am of the opinion that the teacher retiring for the purported 2nd time is not entitled to computation under §238.07(7)(a), but rather is entitled to further benefits accruing under §238.07(7)(b) by virtue of the additional one year of service.

058-324—December 5, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COUNTY COMMISSIONERS—REAL PROPERTY—VIOLATIONS—§§839.09, 839.07, F. S.

To: Gordon G. Oldham, Jr., State Attorney, Fifth Judicial Circuit, Leesburg

QUESTION:

Would land come within the provisions of §839.09, F. S., as supplies?

Section 839.09, F. S., reads as follows:

839.09 *Boards not to purchase supplies from members of boards.*—No state or county board or municipal board or council shall purchase supplies, goods or materials for public use from any firm or corporation in which any member of such board is either directly or indirectly interested, nor shall any such board pay for such supplies, goods or materials so purchased. Any person violating the provisions of this section shall be punished, upon conviction, by fine not exceeding five hundred dollars or imprisonment not exceeding one year; provided, that no member of any board aforesaid who shall have recorded his vote against such illegal purchases, or who shall have been absent at the taking of the vote thereon, shall be convicted of a violation of this section.

This statute is penal and, therefore, must be construed with such strictness as to carefully safeguard the rights of the accused and at the same time preserve the obvious intention of the legislature (*Watson v. Stone*, 148 Fla. 516, 4 So. 2d 700, 702). An examination of the previous opinions of this office indicate that the word "supplies" does not include land within the scope of §839.09, *supra*.

In A. G. O. 051-179 and 051-335, it was held that "the words 'supplies,' 'goods,' 'materials,' and 'merchandise' all appear to be used more or less interchangeably to convey the meaning of articles having an 'intrinsic value in bulk, weight or measure.'" These interpretations clearly indicate that the statute contemplated purchases of personal property made by state or county boards or municipal boards or councils from any firm or corporation in which any member of such board is either directly or indirectly interested and did not contemplate the purchase of real property.

In keeping with the principle set down by the Florida supreme court that, if there is doubt or ambiguity in any provision of a statute leaving a doubt as to its meaning, the provision is to be construed in favor of life and liberty (*City of Leesburg v. Ware*, 113 Fla. 760, 153 So. 87; *Watson v. Stone*, *supra*), the statute must be construed as not including land. Your question is therefore answered in the negative.

However, I call your attention to §839.07, F. S., which reads as follows:

839.07 *Officers prohibited from bidding, etc., for public work.*—It is unlawful for any commissioned or other officer of this state, or for any officer elected or otherwise of any county or incorporated town or city therein, to bid or enter into, or be in any way interested in, a contract for the working of any public road or street, the construc-

tion or building of any bridge, the erecting or building of any house, or for the performance of any other public work in which the said officer was a party to the letting, and any person upon conviction thereof shall be punished by fine not exceeding five hundred dollars or imprisonment not exceeding one year.

The supreme court of Florida in two civil cases has interpreted this statute as prohibiting the sale to the city of real property owned by a city commissioner or in which a city commissioner had an interest. In *Town of Boca Raton v. Raulerson*, 108 Fla. 376, 146 So. 576, the court held that the sale to the city of property owned by the city commissioner was void under §839.07, supra. In *City of Stuart v. Green*, 156 Fla. 551, 23 So. 2d 831, the court reaffirmed their position regarding such a transaction and further held that a stockholder of a corporation, which sells the property, comes within the meaning of the act if such stockholder is an elected official of the city.

In light of the above-stated cases, it would appear that a county commissioner who was an officer or stockholder of a corporation that sold property to the county would come within the provisions of §839.07, supra.

058-325—December 5, 1958

PUBLIC BUSINESS

PURCHASE OF INSURANCE—COUNTY BOARDS OF PUBLIC INSTRUCTION—§237.02(2), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Does the requirement of requesting bids from three or more sources for any authorized purchase costing more than \$300 as stipulated by §237.02(2), F. S., apply to the purchase of insurance by a county board of public instruction?

Section 237.02 (2), F. S., provides:

Bids—Bids shall be requested from three or more sources by the county board for any authorized purchase costing more than three hundred dollars. The county board shall have the authority to reject any or all bids and request new bids. In the acceptance of bids, the county board shall accept the lowest and best bid.

In an opinion issued by the attorney general on Sept. 29, 1939 (*Biennial Report of Attorney General 1939-1940*, p. 153) the following statement was made: "It is my opinion that contracting for public liability insurance on school buses is not such a 'purchase' as would bring it within the provisions of the statute here considered," (referring to §237.02 (2), F. S., or subsection 2 of §1060, Ch. 19355, 1939).

I believe that the 1939 attorney general's opinion was correct and it is hereby reaffirmed.

The purchase of insurance should not be confused with the purchase of goods, supplies, materials and other commodities having an intrinsic value in bulk, weight or measure. See 27 Words and Phrases 80: "Merchandise as used in a charter incorporating a

steamboat company for the transportation of merchandise does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading. . . ." *Indiana Bond Co. v. Oge*, 54 N.E. 407; *Citizens Bank v. Nantucket Steamship Co.*, 5 Fed. Cas. 719.

Even more important is the fact that the rate structure of insurance to a large extent is under the direct supervision of the state.

Public policy, however, dictates that insurance must be purchased by public boards without favoritism and should be bought solely on the basis of securing the best insurance protection available to meet the specific need at the least cost to the taxpayer.

Subject to the above comment, your question is answered in the negative.

058-326—December 8, 1958

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—RETIRED JUDGES—
COMPENSATION—CH. 122, F. S.; §19, ART. V,
STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a retired judge, other than a supreme court justice, circuit judge, or judge of a district court of appeals, is called into active service, should his retirement pay be suspended during such service?

Judges of this state, other than supreme court justices, circuit judges, and judges of the district courts of appeal, are within the purview of Ch. 122, F. S., and their retirement is governed by said chapter except as otherwise provided by superior or subsequent law. Under §19, Art. V, State Const., "a retired justice or judge assigned to active judicial service shall, while so serving, receive *as additional compensation* the difference between his retirement benefits and the compensation applicable to such service." This constitutional provision is the controlling law notwithstanding possible contrary provisions in Ch. 122, F. S., and the above question must be answered in the negative.

When such a judge is assigned to active service he should continue to draw his retirement compensation from the usual source and in addition thereto receive the difference, if any, between such retirement pay and the salary or average compensation of the judge in lieu of whom he may be presiding, the same to be paid from the same source from which the regular judge is paid.

058-327—December 8, 1958

EDUCATION

SCHOOL PERSONNEL—CONTINUING CONTRACT BENEFITS,
TEACHERS HOLDING LIFE SPECIAL TEACHING
CERTIFICATES, RANK III—§231.36, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

Do the continuing contract benefits for teachers both as to tenure and financial status apply to teachers holding life special teaching certificates in Rank III, or higher?

Section 231.36, F. S., provides for continuing contracts "... each member of the instructional and administrative staff in each county system ... who holds a regular certificate based at least on graduation from a standard four year college ... shall be entitled to and shall be issued a continuing contract ..."

Prior to the enactment of the above cited statute, teaching certificates in the public schools were issued to personnel meeting such academic and professional requirements as were set forth by the state board of education. In addition to the requirement of graduation from a regular four-year college, several equivalents were substituted to enable those persons who were unable to complete four years of college to obtain certificates based upon a combination of formal schooling and practical experience. In some of these instances comprehensive examinations were given and successful candidates were issued special teaching certificates, which were convertible into the above mentioned life special teaching certificates provided the holders thereof taught satisfactorily for 24 months in the field of their particular specialty.

Many of the life special teaching certificate holders, now numbering approximately 40, are approaching retirement age, after having served the Florida educational system faithfully and with a high degree of proficiency for a number of years. During this time these teachers enjoyed substantially the same rights, privileges and benefits as the holders of other life teaching certificates of similar rank.

It is my opinion that §231.36, F. S., hereinbefore cited was enacted and intended by the legislature to be the minimum standard or level of professional preparedness for teachers and to encourage and inspire greater academic and educational achievement within the profession, and no intent or interpretation appears in the statute which would deprive these previously recognized, highly proficient persons, whose pedagogical skill resulted from the school of practical experience and non-academic formal training of this desirable professional benefit. Neither does it appear that the legislature intended for these teachers to be relegated to any less favorable position than the holders of ordinary life certificates of comparable rank.

The continued recognition of nonformal academic training is substantiated by the recent enactment of §231.361, F. S., in which vocational teachers and other persons similarly situated qualifying for teaching certificates are entitled to all the contractual

rights and privileges now granted to other instructional personnel holding certificates of corresponding rank.

The fact that these holders of legally recognized life certificates have in all other respects been considered equal to and on a par with the newer types of certificates issued since 1939, leads me to conclude that the group of music teachers and bandmasters herein affected in Rank III and higher are entitled to the continuing contract provisions of §231.36, F. S., and the resulting increase in the emoluments thereof.

058-328—December 9, 1958

VOCATIONS AND PROFESSIONS

FLORIDA STATE BOARD OF BEAUTY CULTURE—BEAUTY CULTURE SCHOOLS, TRANSFER OF STUDENTS— CH. 477, F. S.

To: *Miss Ethel M. Manning, Executive Secretary, State Board of Beauty Culture, Tallahassee*

QUESTION:

Because of unpaid tuition, do schools of beauty culture have the authority to deny a student who desires to transfer from one school to another a certificate of transfer which shows the number of hours the student attended school?

Pursuant to authority invested in it by Ch. 477, F. S., the Florida state board of beauty culture has adopted the following rule and regulation, relating to students enrolled in schools of beauty culture in Florida, as found on p. 3 of the said board's rules and regulations governing beauty schools in Florida.

A student desiring to transfer to another school shall properly fill out transfer form furnished, and receive permission from the State Board of Beauty Culture.

Although the rule is somewhat ambiguous as to the responsibility of the school to fill out the said transfer form, an examination of such form as furnished by the board and heretofore accepted by the schools indicates that it has been the procedure for the student to fill out the 1st part stating the school in which he is now enrolled, the name of the school to which transfer is desired and the reason for transferring; whereas, the 2nd part of the application for transfer is to be filled out by the instructor of the school, stating the number of hours credit the student has in each subject. The 3rd part of the form shows the approval date by the state board of beauty culture.

Under the heading of "Records," we find the following rule on p. 4 of the rules and regulations of the board of beauty culture:

A monthly record of hours completed shall be kept on forms furnished by the Board, and forwarded by the tenth day of the following month, to the Executive office. Such record shall show number of hours of study (practice and theory) of each student in all required subjects.

Schools are required to keep daily records of each student, including practice work and number of services rendered to the public.

A further rule of the board as appears on p. 3 of the rules and regulations of said board, governing schools of beauty culture, pro-

vides as follows:

A student shall be required to comply with school's rules as posted or presented to a student in writing at time of enrollment, said rules having been approved by the State Board of Beauty Culture." (Emphasis supplied.)

In view of the foregoing it is my opinion that the board needs to further clarify by rule and regulation an orderly procedure whereby students may transfer from one school to another. However, in view of the foregoing rules, it is my opinion that in the absence of a rule by the school that it will not comply with the accepted procedure such as has been followed previously in filling out applications for transfer as furnished and prescribed by the board, that the school should be required to continue following the established procedure until same is changed either by rule of the board or by rule of the school, which must be approved by the board and shall not apply to students enrolled prior to the adoption thereof. It is further my opinion that the school shall comply with the rule of the board regarding the keeping and filing of records with the board, irrespective of whether tuition is paid.

Your question is answered accordingly.

058-329—December 10, 1958
(Revision of 058-229)

TAXATION

HOMESTEAD TAX EXEMPTION—EXTENDED ABSENCE
FROM HOMESTEAD AND RENTAL—§7, ART. X,
STATE CONST.—§192.14, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a person, entitled to and receiving homestead tax exemption pursuant to §7, Art. X, State Const., accepts governmental employment in another county, state or place, where he is required to reside during such employment, is he entitled to further homestead tax exemption where the homestead is leased or rented to others and the absence extends over a number of years?

Article X, of the Florida constitution, makes provision for two classes of homestead exemption, *one*, an exemption from the enforcement of ordinary obligations, and the *other*, an exemption from taxation. Under §1 of said article it is provided that "a homestead to the extent of one hundred sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state . . . and the improvements on the real estate, shall be exempt from forced sale under process of any court . . ." Under §7 of said article "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home or the permanent home of another or other legally or naturally dependent upon said person, shall be entitled to an exemption from taxation, except for assessments for special benefit, up to the total assessed value of five thousand dollars on said home and contiguous real property . . ."

Homesteads entitled to exemption from forced sale must be "owned by the head of a family residing in this state . . ." Al-

though this constitutional provision does not expressly require residence upon the homestead property, the courts have construed the section as requiring actual residence upon the property itself, and not merely within the state. Actual residence upon the property claimed as a homestead is essential to establish the homestead (*Solary v. Hewlett*, 18 Fla. 756; *Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865; *Lanier v. Lanier*, 95 Fla. 522, 116 So. 867; *Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588; *Hillsborough Investment Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448). In the light of the rule adopted by the court as to the first section, the residence requirement of said §§1 and 7 are substantially the same.

Section 192.14, F. S., provides that the term "permanent home" or "permanent residence" "shall not be construed so as to require continuous physical residence on the property, but means only that place which the person claiming the exemption shall rightfully and in good faith call his home to the exclusion of all other places where he may, from time to time, temporarily reside." The court, relative to homesteads under §1, stated that "a temporary absence of the head of a family in search of health, pleasure or for business reasons will not deprive the homestead of its character and status as such unless there was a design of permanent abandonment." (*Lanier v. Lanier*, 95 Fla. 522, 116 So. 867, text 868; see also *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448, text 450). *Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529, involved a parcel of land in Jacksonville claimed by Bailey as his homestead and as exempt from taxation under §7 Art. X, State Const. Bailey removed from the premises claimed as his homestead and as tax exempt, around the first of December, and "resided temporarily in another location," returning to the premises from which he moved around the first of March of the following year. "He removed from the premises only his necessary belongings, leaving the house fully furnished and equipped," and rented the same to another, who resided therein, during the period of the absence of the owner. This was held not to be an abandonment of the homestead tax exemption rights of the owner. The property was held exempt under said §7 Art. X, State Const., notwithstanding such removal and rental.

In the *Bailey* case the court stated that "we held in *Lanier v. Lanier*, 95 Fla. 522, 116 So. 867, that temporary absence from the homestead of the head of the family for health, pleasure or business reasons would not deprive the property of its homestead character. See also *Collins v. Collins*, 150 Fla. 374, 7 So. 2d 443; *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448," and further stated that "temporary absence, regardless of the reason for such, from the homestead, will not deprive it of that character, providing an *abiding intention to return* is always present." This abiding intention to return, is not to be determined from the words of the homesteader, but is a conclusion to be drawn from all the applicable facts. The circuit court, in the case of *McCullough v. Forbes*, tax assessor (47 So. 2d 780), stated that "the petitioner testifies that she has not abandoned the home so far as the mental attitude and intent are concerned. She claims it as her home, she says it is her castle. All this is shadow and the substance is that in truth and in fact her intent is not the substance, but the substance of this matter is the fact that the land is no longer her residence. Her age and her physical condition have nothing to do with the case, *except*

as bearing on her intent, and age and physical condition should be considered in this connection. But intent is not sufficient to make residence. Intent is a part of the whole which constitutes residence." The circuit court's decree was affirmed per curiam by the supreme court (*McCullough v. Forbes*, Fla., 47 So. 2d 780). The court in *L'Engle v. Forbes*, Fla., 81 So. 2d 214, text 215, remarked, concerning the *McCullough* case, that "in addition to the facts stated in the dissenting opinion, reference to the record discloses other facts considered by the lower court in its determination that there had, in fact, been a permanent abandonment of the homestead by the plaintiff despite her declaration that she intended to return to her home at some indefinite time in the future. And, as noted, a majority of the court considered these additional facts sufficient to distinguish the case from that of *City of Jacksonville v. Bailey*, . . ."

The court, in *L'Engle v. Forbes*, Fla., 81 So. 2d 214, text 216, while considering §192.14, F. S., stated that "we think it can fairly be said that the legislature intended to adapt, to the homestead tax exemption privilege conferred by section 7, supra, the rules previously developed by this court with respect to the homestead character of property within the meaning of sections 1 and 4 of article X. While this court has not expressly so held in any previous decision, we have done so impliedly by citing cases involving the exemptions granted by sections 1 and 4 as authority for a decision involving the character of property for the purpose of homestead tax exemption under section 7, see *City of Jacksonville v. Bailey*, supra, 30 So. 2d 529 . . ."

"It is always a question of fact in each particular case whether abandonment (of a homestead) has actually occurred" (*Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529, text 530). Whether evidence of abandonment of homestead establishes an abandonment is a question of fact to be established from the preponderance of all the evidence (*Nelson v. Hainlin*, 89 Fla. 356, 104 So. 589, text 590; *Gulf Refining Co. v. Ankeny*, 102 Fla. 151, 135 So. 521, text 523; *Beck v. Wylie*, Fla., 60 So. 2d 190, text 192; 40 C. J. S. 675, §198). "In order to warrant a conclusion that the claimant's right to homestead has been lost, it must appear that the claimant relinquished possession of the premises and removed therefrom and that his removal was accompanied by an intention to discontinue his use of the premises as a home" (26 Am. Jur. 119, §193). "The removal of the family from the home and their prolonged absence may constitute a prima facie case of abandonment, and create against the claim of homestead a presumption which must be rebutted before such claim can be sustained" (26 Am. Jur. 120, §193). In *McCullough v. Forbes*, Fla., 47 So. 2d 780, by reference to the transcript of record thereof in the office of the clerk of the supreme court, it was held that a homestead claimant's statement of an intention to return to his homestead and that there has been no abandonment of it, is not conclusive but merely evidence of an intention not to abandon, to be taken into consideration in connection with any other evidence bearing upon the same question. "Declarations may be relevant evidence as to the existence of a particular intent or intention in the mind of the declarant" when intent or intention is material to the issue. Such "declarations are not direct evidence of the facts asserted, but merely circumstantial evidence as to the existence of some relevant and material fact" (31 C. J. S. 1007-1008, §256). The length of time which the homesteader remains

away from the premises after removal might tend to raise a presumption of abandonment, but such duration of the absence is not conclusive evidence of abandonment. (40 C. J. S. 677-678, §198).

In *Murphy v. Farquhar*, 39 Fla. 350, 22 So. 681, Farquhar and wife, who resided on a farm some miles from Tarpon Springs, established a business in Tarpon Springs and moved from their homestead into Tarpon Springs where they occupied a dwelling as a place of abode for several years, making frequent trips back to the claimed homestead, often spending the weekends there; however, they carried prepared food for their consumption while away from their residence in Tarpon Springs. There is indication in the opinion that had such been the only facts involved, that the claim for homestead would have been sustained; however, in addition to these facts it appeared that there had been an attempted transfer of title from the husband to the wife, and that the husband had registered and voted in the Tarpon Springs voting precinct instead of the one in which the claimed homestead was located. The court held that upon all the facts, notwithstanding the claimed intention to return to the property and use it again as a home, there had in fact been an abandonment of the homestead. It would be helpful for those interested in the question to study the annotation appearing in 102 American State Reports, pp. 388-412, relating to the abandonment of homesteads.

Although "temporary absence from the homestead of a homesteader for health, pleasure or business would not deprive the property of its homestead character" (*City of Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529, text 530) where there is an *honest and actual intention* on the part of the homestead owner to return to his homestead and take up residence there again, this intention being a state of the mind is not proven merely by the statement of the homestead claimant, but is to be determined from all available evidence. The continued expressed intention of a landowner that he intends to return to his property and further maintain it as a homestead although *prima facie* evidence of that fact, is not controlling and will be overcome by evidence to the contrary. Such expressed intention is merely one item of evidence to be considered in connection with other available evidence. In the *McCullough* case it was quite evident that Mrs. McCullough, in her own mind, entertained an abiding intention to return to the property claimed as her homestead and further maintain it as such; however, other evidence, including her age, state of health and physical condition, clearly demonstrated that she could not and would not be able to further maintain the property as her homestead, whether she admitted it or not. In the *Bailey* and *L'Engle* cases there was no like, similar or other evidence sufficient to overcome the express intention of the homesteaders to return to their premises after temporary absences.

Although the rule seems to be that an absence from one's homestead for an extended length of time is not of itself an abandonment of the homestead, such an absence may raise a presumption sufficient to cast the burden on the claimant to satisfy the tax assessor that there has in fact been no abandonment. Such an absence may be taken, together with other evidence tending to show an abandonment, to show an abandonment and no actual intention to return to the property and further maintain it as a homestead. The lease or rental of the homestead is evidence, which when taken and considered with all other available evidence, tending to prove

an abandonment; but may not be sufficient evidence to prove abandonment within itself. The question of abandonment of a homestead, by reason of absence, leasing, etc., is a matter of fact to be determined from all the available evidence. Mere absence from one's homestead for "health, pleasure or business reasons" (*Jacksonville v. Bailey*, supra) is not of itself an abandonment, but may be considered, in connection with all other available evidence, in determining whether there has been or has not been an abandonment of the homestead.

The above stated question is one which must be answered from the facts, circumstances and evidence applicable in each particular case, considered in the light of the above and foregoing legal observations, cases and authorities.

058-330—December 11, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM FOR SCHOOL TEACHERS—
SURVIVORS BENEFITS—§§238.05(3) AND 238.07, F. S.**

To: *K. D. Farris, Director, Teachers' Retirement System, Tallahassee*

QUESTIONS:

1. Are the beneficiaries of a teacher entitled to benefits under §238.07 (16), F. S., if the teacher's service in Florida ended and service retirement began subsequent to July 1, 1957, and the teacher dies within 10 years after last serving in Florida?

2. If a teacher has taught three years in Florida and dies in service subsequent to July 1, 1957, and at the time of the teacher's death he has a dependent parent who is under 65 years of age, will the parent be entitled to survivors benefits upon reaching age 65?

3. If a teacher has taught 10 years in Florida and dies in service subsequent to July 1, 1957, and at the time of the teacher's death he has a dependent spouse under 50 years of age, will the spouse be entitled to survivors benefits upon reaching age 50?

4. If a teacher has taught 10 years in Florida and dies in service subsequent to July 1, 1957, and at the time of the teacher's death he has a spouse who is not dependent and is not 65 years of age, will the spouse be entitled to survivors benefits upon reaching age 65?

5. Is a widow who is drawing a survivors benefit pension for a child entitled to a full month's check for the month in which the child becomes 18 years of age if the child reaches such age prior to the last day of the month?

6. If a teacher who has rendered nine years of teaching service in Florida through Jan. 1, 1958, withdraws his accumulated contributions upon completion of such service and dies within five years of his last day of service, are his beneficiaries entitled to survivors' benefits?

7. Are the beneficiaries of a teacher entitled to survivors benefits if the teacher was drawing a disability

allowance prior to July 1, 1957, and continued to draw such allowance until his death subsequent to July 1, 1957?

AS TO QUESTION 1:

Section 238.05 (3), F. S., provides that "... Membership of any person in the retirement system shall cease ... upon retirement. ..." Therefore, a person who dies after retirement on service is not a member of the retirement system within the meaning of §238.07, F. S., and no survivor benefits inure to his beneficiaries unless said teacher has exercised one of the options provided for in §238.08, F. S., which options permit a member to elect, prior to receipt of his first retirement installment or annuity allowance, to receive a lesser amount with the remainder to such person as he may nominate or to his surviving spouse.

Section 238.07(16)(d)4., F. S., contemplates that only the beneficiaries of a member of the retirement system whose death occurs while he is in service or while drawing a disability allowance shall be eligible for survivor benefits.

Question 1 must therefore be answered in the negative.

AS TO QUESTION 2:

Section 238.07 (16) (c), F. S., provides that the payment of survivor benefits shall begin as of the month immediately following the death of the member except where the beneficiary has not reached the age required to receive benefits under paragraph 16(b) of said section, in which event the payment of survivor benefits shall begin as of the month immediately following the month in which the beneficiary reaches the required age.

The eligibility of a parent for survivor benefits is determined by his dependency status at the time of the death of the member and if said beneficiary has not reached the age prescribed by the above mentioned paragraph (b), he shall be entitled to receive the benefits upon the attainment of that age.

The answer to question 2 is in the affirmative.

AS TO QUESTION 3:

The eligibility of a dependent spouse for survivor benefits at age 50, depends upon the dependency status of said spouse at the death of the member, as is indicated by §238.07 (16) (c) recited in the answer to question 2 above, if the other requirements have been met the spouse is entitled to receive survivor benefits upon attaining the prescribed age.

The answer to question 3 is in the affirmative.

AS TO QUESTION 4:

Section 238.07 (16) (b) 6., provides that the surviving spouse of a teacher who dies in service after having taught 10 years or more shall be entitled to survivor benefits of \$100 per month for life, which benefits become payable upon reaching age 65.

No reference is made herein as to the dependency requirement, therefore the answer to question 4 is in the affirmative.

AS TO QUESTION 5:

Section 238.07 (16) (a) 2., (3) provides: "... no benefits shall be paid to any person who is a child of a deceased member after such person becomes eighteen years of age."

Notwithstanding the above provision, it appears that the intent and purpose of the legislature would be better effectuated by payment of the last benefit check covering the month that the child reaches age 18.

This position is further substantiated by reading as a whole other sections of the teacher retirement law. Section 238.01 (16), (17), F. S., stipulates that payment of annuities and pensions shall be in equal monthly installments. Section 238.07 (16) (d) 2., provides that the payment of survivor benefits shall begin one month following the death of the member.

This view is in keeping with the long standing practice of the board to issue checks on the last day of the month and from an administrative position it appears that the continuance of this policy would be more economical and practical than would be the computation in individual cases of a portion thereof.

The answer to question 5 is in the affirmative.

AS TO QUESTION 6:

Section 238.05 (3), F. S., provides that membership of any person in the retirement system shall cease upon the withdrawal by a member of his accumulated contributions.

Survivor benefits are specifically provided for the survivors of a member who dies in service or who dies while receiving a disability allowance. Therefore, a teacher who has withdrawn such contributions has terminated his membership in the system and no benefits inure to his survivors.

The answer to question 6 is in the negative.

AS TO QUESTION 7:

The survivors benefit law became effective July 1, 1957, and those persons retiring under disability provisions prior to that time are in no way affected by the provisions thereof since they did not contribute to nor participate in the plan.

The intent of the legislature appears to be that only those persons in active service at the time of the enactment and subsequent thereto should participate, and then only if they elected to do so and contributed to the fund.

The answer to question 7 is in the negative.

058-331—December 15, 1958

Supersedes 058-23, 058-68 and 058-261

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—PARTNERSHIPS, JOINT ADVENTURES, ESTATES BY THE ENTIRETIES, ETC.—§§2.01, 47.15, 199.01, 199.02, 675.15, 708.08 ET SEQ.; §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where a member of an unincorporated firm, or a partner in a general or limited partnership, having its principal office or place of business in this state, is a resident of this state, is his interest in the firm or partnership, or in the firm or partnership property, subject to intangible personal property taxation in this state?

2. Where a member of an unincorporated firm, or a partner in a general or limited partnership, having its principal office or place of business in another state, is a resident of this state, is his interest in the firm or partnership, or in the firm or partnership property, subject to intangible personal property taxation in this state?

3. Is the interest of a joint adventurer, in a joint adventure, an interest in a separate entity, similar to the interest of a partner in a partnership, for the purpose of intangible personal property taxation?

4. Is the interest of a spouse in an estate by the entirety an interest in a separate entity, similar to the interest of a partner in a partnership, for the purposes of intangible personal property taxation?

5. May there be a partnership between husband and wife and, if so, what are the elements which will determine when such a partnership exists?

6. What is the measure of value of an interest in a partnership for the purpose of intangible personal property taxation?

Nature of a partnership.—It has been said that a partnership is created when two or more persons unite their money, goods, labor or skill, or two or more thereof, in the conduct of a business or trade with a community of interest in the profits and losses (Trapp v. U. S., CCA 10th, 177 Fed. 2d 1; 68 C. J. S. 398, §1). A partnership is a status resulting from a contract (Temm v. Temm, 354 Mo. 814, 191 S. W. 2d 629; 68 C. J. S. 399, §1). It is an entity distinct and apart from the members composing it (Re Zent's Estate, 148 Neb. 104, 26 N. W. 2d 793).

Interest of partner in firm property.—"Theoretically the partnership assets are vested in the partnership entity. No one partner has a right to possess any of the partnership property to the exclusion of the other partners. The interest of each partner is that undivided portion of the partnership assets which may remain after all partnership debts are paid. Succession of Pilcher, 39 La. Ann. 362, 1 So. 929; Townsend v. Payne et al, 42 La. Ann. 909, 8 So. 626; First Nat. Bank of Shreveport v. Davis et al, La. App., 147 So. 93; 40 Am. Jur. p. 447; Modern Law of Partnership by Rowley, Sections 830 and 831." (B. A. Lott, Inc. v. Padgett, 153 Fla. 308; 14 So. 2d 669, text 670). "The interest of a partner in the firm assets is the share to which he is entitled, under the partnership agreement, after claims against the firm are satisfied and the equities and accounts as between the partners adjusted. Although title to it is held or taken in the name of one of the partners, the rule is that the partners do not, as individuals, own the firm property, but that it is held by, and belongs to, the partnership as such, and the partners do not, as individuals, have any specific interest in any particular asset or particular part of the assets; nor can a partner assign or transfer an undivided share in any specific articles belonging to the partnership. The interest has been said to be a mere chose in action. It is property, or, more precisely, personal property, regardless of the character of the property owned by the partnership, and it is susceptible of being seized under legal process, as well as of being sold and conveyed, assigned, or mortgaged" (68 C. J. S. 525 and 526, §85).

"It is well settled that the joint effects of a partnership belong to the firm, and not to the partners, and that a partner has no individual property in any specific assets of the firm, and no right during the existence of the partnership to the exclusive possession or use of any of its property. Instead, the interest of each partner in the partnership property is his share in the surplus after the partnership debts are paid, and after the partnership accounts are settled and the rights of the partners inter se are adjusted. Nothing

is to be considered as the share of a partner but his proportion of the residue or balance after an account has been taken of the debts and credits, including the amounts paid by the several partners in liquidating firm debts or in making advances to the partnership. This interest in the surplus alone is available for the satisfaction of the separate debts of the partner." (40 Am. Jur. 209 and 210, §114). A partner's right as co-owner of specific partnership property is distinguishable from his interest in the partnership, which is defined as his share of the profits and surplus (*Windom Nat. Bank v. Klein*, 191 Minn. 447, 254 N. W. 602; *Commissioner v. Whitney*, CCA 2d, 169 Fed. 2d 562; *State v. Elsbury*, Nev., 175 P. 2d 430).

Interest of partner in partnership an intangible.—Chief Justice Taft, speaking for the court in *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. ed. 749, text 757, stated that the interest of a partner in a partnership "was simply a right to share in what would remain of the partnership assets after its liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible and carries with it a right to an accounting." It was held in some jurisdictions that the interest of a partner in partnership property was subject to taxation (*Re Bijur's Estate*, 127 Misc. 206, 216 N. Y. S. 523; *Re Hanson's Estate*, 119 Misc. 100, 195 N. Y. S. 255; *Re Small's Estate*, 151 Pa. St. 1, 25 A. 23). The taxation of intangible personal property is expressly authorized by §1, Article IX, State Const. "Intangible personal property" is defined by §199.01, F. S., as "personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." Shares of "unincorporated companies" are, by §199.02, F. S., classified as class "B" intangible personal property; all intangibles not otherwise classified are within class "D" intangibles. It is, therefore, quite evident that interests of partners in partnerships are intangible personal property and within the purview of Ch. 199, F. S., and subject to taxation thereunder.

Partnerships versus joint adventures.—"... the principal difference between a partnership and a joint adventure is that the former term is generally used to characterize a *general and continuing* joint adventure, while the latter term, usually, though not necessarily, designates a *single* joint adventure consisting of one transaction." (*Proctor v. Hearne*, 100 Fla. 1180, 131 So. 173, text 176; *Willis v. Fowler*, 102 Fla. 35, 136 So. 358, text 365; *Bryce v. Bull*, 106 Fla. 336, 143 So. 409, text 411). Where two business men jointly owned trucks and operated them "to transport their own goods, at their own expense, and as a mere incident to the conduct of their respective mercantile businesses," and not as carriers for others, such joint ownership would not seem to constitute a partnership (see *State v. Karel*, 131 Fla. 305, 180 So. 3, text 8). The test of the existence of a partnership is largely the intention of the persons entering into the joint or business agreement (*Uhrig v. Redding*, 150 Fla. 480, 8 So. 2d 4, text 6). Not every joint agreement concerning a business venture constitutes a partnership.

The relationship of a joint adventure "is quite similar to that of a partnership and is governed by the principles which constitute and control the law of partnership The principal difference between a partnership and a joint adventure is that a joint adventure is usually limited to a single enterprise" (*Russell v. Thielen*, Fla., 82 So. 2d 143). A "joint adventure is an agreement between two or more persons to acquire specific property for speculation or

resale at a profit, the distinction between such an agreement and one of partnership being the limited and specific object in view. (*Donahue v. Davis*, Fla., 68 So. 2d 163). "Joint adventurers take title to real estate purchased by them as tenants in common and not as partners." (48 C. J. S. 834, §7). Title to joint adventure property may be vested in a trustee for the use and benefit of the joint adventurers (30 Am. Jur. 966, 38). The purpose of a partnership is a general and continuing one, while that of a joint adventure is usually single or limited.

Married women as partners.—In *De Graum v. Jones*, 23 Fla. 83, 6 So. 925, text 926, the court remarked that "when one of the parties (to a partnership contract) is without the legal capacity to assume these obligations, as a married woman is, there can be no legally existing partnership between them . . ." See also *Virginia-Carolina Chemical Co. v. Fisher*, 58 Fla. 377, 50 So. 504, text 507, and *Friddle v. Stewart*, 129 Fla. 821, 176 So. 750. This rule of common law was changed by Ch. 21932, 1943, now appearing as §§708.08, et seq., F. S., which authorize married women to enter into partnership agreements, as respects her separate property under the constitution, even with her husband. This statute has been held not retroactive (*Shinn v. McLeod*, 58 Fed. Supp. 440), and to empower a married woman to make a binding agreement with her husband (*Nock v. Wayble*, Fla., 59 So. 2d 875).

Estates by the entirety.—"If an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common; for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout et non per my, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." (*Green v. Cannady*, 77 S. C. 193, 57 S. E. 832, quoting from 1 *Sherwood's Blackstone* 181). This common law rule is expressly made a part of the law of Florida (§2.01, F. S.), so that a conveyance of a fee to a husband and wife creates an estate by the entirety, unless an intent to create another relation clearly appears from the instrument (*Knapp v. Frederickson*, 148 Fla. 311, 4 So. 2d 251). The essential characteristic of an "estate by the entirety" is that each spouse is seized of the whole of the entirety, and not a share, moiety or divisible part (*Ashwood v. Patterson*, Fla., 49 So. 2d 848). It is therefore evident that a conveyance to a husband and wife will not establish a partnership unless such an intent clearly appears from the transaction.

Business situs of partnerships.—Many cases recognize that businesses operated under modern methods may acquire a business situs, different from the residence of the owners, for some purposes (*Anno.* in 76 A. L. R. 806-829, and 143 A. L. R. 361-389), including purposes of taxation. This rule has been applied to partnership businesses (*Clay, Robinson and Co. v. Douglas County*, 88 Neb. 363, 129 N. W. 548, L. R. A. 1915C 922, Ann. Cas. 1912B 756).

Title to partnership property.—"The common law rule that a partnership cannot hold title to real property does not apply to personal property. The personal property of a partnership is owned not by the partners individually, but by the partnership" (40 Am. Jur. 202, §107; see also 68 C. J. S. 502, §70). At least in equity "where real estate is acquired in a partnership business, and for partnership purposes, it will be treated as partnership property, though the

legal title be taken in the name of one of the partners, or in the name of a stranger" (Proctor v. Hearne, 100 Fla. 1180, 131 So. 173, text 177 and cases cited). There is no dower in partnership real estate (Price v. Hicks, 14 Fla. 565; Loubat v. Nourse, 5 Fla. 350) superior to the right of partnership creditors. Where title to real or other property is merely vested in two or more parties, with nothing more, such vesture of title does not of itself constitute a partnership, but the business or contractual relations of the owners must be looked to to determine whether there is in fact a partnership or merely a joint venture or other joint relationship.

Distinction between partners and the partnership. — "The property of a copartnership should be assessed to it in the firm name. Real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly giving the names of all" (84 C. J. S. 774, §404; see also 61 C. J. 637, note 52). Cooley states that "property of a partnership is generally with much propriety required to be taxed at the place where the partnership business is carried on; and it should be assessed in the firm name." (3 Cooley on Taxation, 3rd ed. 1236 and 1237, §105). "Property owned by a partnership is properly taxed in the name of the firm, and not in the name of an individual member thereof, although assessment in the name of a member will not necessarily invalidate the tax, and the partnership property may be considered as owned by the partners for the purpose of taxation" (84 C. J. S. 219, §106). Where negotiable paper of a partnership has been dishonored notice thereof need only be served on one of the partners (§675.15, F. S.). Provision is made in §47.15, F. S., for the bringing of legal proceedings against partnerships as separate entities and service of process on a single partner binds the partnership property. These sections treat a partnership as a separate entity for such purposes. "It is well settled that the joint effects of a partnership belong to the firm, and not to the partners, and that a partner has no individual property in any specific assets of the firm Instead, the interest of each partner in the partnership property is his share in the surplus after the partnership debts are paid" (40 Am. Jur. 209, §114). The rule seems to be that partners do not (at least in equity) as individuals own the firm property, but that it is held by and belongs to the partnership as such, and the partners do not as individuals have any specific interest in the assets of the partnership (68 C. J. S. 525, §85).

Conclusions.—From the above authorities and observations we reach the following conclusions:

a. The partnership property, whether title be by conveyance in the partners or in the partnership as an entity, belong in equity to the partnership and not to the partners themselves.

b. The interests of the partners themselves, in the partnership itself as distinguished from its property and assets, is his share or undivided portion in the assets of the partnership after the payment of obligations and other charges against the partnership. In other words it is determined by the net worth of the partnership.

c. This interest of the partners are intangibles and subject to taxation in this state as intangible personal property of the partner, provided such property has its taxable situs in this state.

d. In taxing partnership interests in partnerships we must keep in mind the distinction between partnerships and other relations

such as joint adventures. Partnerships are usually organized for the purpose of carrying on a general and continuing business, while joint adventures are usually for the carrying out of a single transaction. This distinction is discussed above under the heading of "partnerships versus joint adventures."

e. Estates by the entireties, like joint adventures as above described, are not partnerships and should not be so treated for the purposes of taxation.

In the light of the foregoing the above stated questions are answered as follows:

1. This question is answered in the affirmative. In this connection it must always be kept in mind that the value of the partnership interest is measured *by the net worth of the partnership*, that is the value of its property less obligations. Here we are taxing the property right of the partner, not the assets of the partnership as such.

2. This question is answered in the affirmative, subject to like observations as made to the 1st question.

3. This question is answered in the negative; however, care must be taken to distinguish between joint adventures and partnerships.

4. This question is answered in the negative. A person holding by the entireties holds title to the property and not an interest in some entity as does a partner.

5. This question is answered in the affirmative, by virtue of the 1943 enactment above referred to. Before property held by a husband and wife is to be treated as partnership property such should clearly have been their intention.

6. The measure of value of an interest in a partnership "is the share to which he is entitled, under the partnership agreement, after claims against the firm are satisfied and the equities and accounts as between the partners have been adjusted." His share is not measured by the gross assets of the partnership, but by the net worth of the partnership.

This opinion supersedes opinions 058-23, of Jan. 24, 1958, 058-68, of Feb. 21, 1958, and 058-261, of Sept. 3, 1958, which opinions are hereby withdrawn and annulled.

058-332—December 15, 1958

INSURANCE

QUALIFICATIONS FOR SELF-INSURERS UNDER §324.171, F. S., COUNTY—MOTOR VEHICLE LIABILITY INSURANCE FOR PUBLIC OFFICERS—COUNTY IMMUNITY FROM TORT LIABILITY, §455.06, F. S.

To: Donald C. McClelland, Jr., County Attorney, Sarasota County, Sarasota

QUESTIONS:

1. May a county qualify as a self-insurer under the provisions of §324.171, F. S.?

2. Would liability insurance coverage secured by the county under authority of §455.06, F. S., alter the county's immunity from tort liability in connection with an accident involving a privately owned vehicle used by a

county employee while in the performance of his official duties?

AS TO QUESTION 1:

Any person may qualify as a self-insurer by obtaining a certificate of self-insurance from the commissioner (§324.171, F. S.). A person under the financial responsibility law (Ch. 324, F. S.), is defined as every natural person, firm, copartnership, association or corporation (§324.021(4), F. S.). Inasmuch as this definition does not include the municipalities and political subdivisions of the state, it is my opinion that a county could not qualify as a self-insurer under the financial responsibility law.

Question 1 is answered in the negative.

AS TO QUESTION 2:

Under the doctrine of sovereign immunity the county is not liable for tort committed while performing a governmental function (Aaron v. Palm Beach County, 32 So. 165, 159 Fla. 517) and county commissioners are held immune from tort action (Bragg v. Board of Public Instruction of Duval County, 36 So. 2d 222, 160 Fla. 590). Thus, in the absence of a consent statute, causes of action sounding in tort do not lie against the county.

In the case of tort claims arising from the operation of a motor vehicle *owned or leased and operated* by the county on the public highways, consent to suit against the county has been given in that the defense of sovereign immunity is waived where a county has availed itself of liability insurance coverage as authorized by this section. Further language of this section limits the liability of the county to the amount of the insurance coverage involved and modifies the doctrine of sovereign immunity *only to that extent*. In other words, the amount of recovery available to any particular claimant bringing tort action against the county for damages resulting from the operation of a county owned or leased motor vehicle is limited to the policy limits as they apply to the individual claims. The doctrine of sovereign immunity would apply to the amount of a claim in excess of the policy limits designated for each claim. Inasmuch as this section authorizes a liability insurance program only in connection with motor vehicles *owned or leased and operated* by the county, I do not believe that the present state of the law would prevent the application of the doctrine of sovereign immunity to a situation involving a privately owned vehicle operated by a county employee in the performance of his official duties.

I hasten to point out, however, that although the doctrine of state and county immunity from tort liability appears to be firmly imbedded in the law of this state, the recent decision of Justice Thornall in Hargrove v. Town of Cocoa Beach 96 So. 2d 130, gives recognition of the modern trend to modify the immunity doctrine. Although that case deals with a municipality, and unquestionably there is a recognizable distinction between municipal corporations and counties as political subdivisions of the state, it may well be that under certain circumstances our court will hold counties liable for tort damage.

In view of the Cocoa Beach case and the provisions of §455.06, F. S., it is my suggestion that the board of county commissioners give very serious consideration to a program of public liability insurance in connection with the operation of their county owned or leased motor vehicles. The authorities and comments herein

appear to answer the question as completely as it may be answered until such time as our court has an opportunity to again rule on the immunity doctrine as it applies to counties.

058-334—December 16, 1958

**REGULATION OF PROFESSIONS AND VOCATIONS
BOARD OF CHIROPODY EXAMINERS—REFUND OF
EXAMINATION FEE—\$461.03, F. S.**

To: *Heywood A. Dowling, Secretary-Treasurer, State Board of
Chiropody Examiners, Jacksonville*

QUESTION:

**When may the fees collected by the state board of
chiropody examiners pursuant to \$461.03, F. S., be re-
funded?**

Section 461.03, F. S., relating to requisites for examinations, subjects, minimum passing grades and fees, provides, among other things, as follows:

... and shall pay an examination fee of fifty dollars, which fee shall accompany the application to the secretary-treasurer of the board of chiropody examiners. Any applicant failing to pass these requirements shall be entitled to a re-examination upon the payment of an additional fee of ten dollars, but two such re-examinations shall exhaust the privilege under the original application. . . .

In view of the foregoing it appears that when the board of chiropody examiners accepts such an application to take the chiropody examination and it makes the necessary and customary investigation concerning the applicant's qualifications, the fee which is required to be submitted with the application is earned; and no part of it may be refunded, although the applicant later requests a return of the fee or is not permitted by the board to take the examination.

Should the board elect not to make any investigation or take action on the application, then it might be said that no part of the fee is earned. The fee is not merely an examination fee, but is intended to compensate the state for making the necessary investigation as well as for giving the examination. The fee is primarily for the purpose of paying the expenses of the board in regulating the practice of chiropody in this state, of which the investigation and examination of the applicants are a part.

When an application has not been acted upon, it might be withdrawn and the fee refunded under §215.26, as nothing is due until some action has been taken on the application. The same would apply to the re-examination fee of \$10.

058-335—December 16, 1958

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—CONTRIBUTION TO RETIREMENT
FUND DURING PERIOD COMPENSATED FOR PARTIAL DISA-
BILITY UNDER CH. 440, F. S.—§§122.03(8) AND 440.15(3), F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

**May a member of the state and county officers and
employees retirement system, injured in an accident
arising out of and in the course of his employment, con-**

tribute to the retirement fund pursuant to §122.03(8), F. S., during the time for which compensation is paid, in a lump sum, pursuant to an order of the Florida industrial commission?

An employee of the state road department, a self insurer, of this state was injured in a motor vehicle accident, on July 18, 1957, arising out of and in the course of his employment, which the Florida industrial commission, through its deputy commissioner, determined to be a *permanent partial disability* with a 23% of loss of earning capacity. This finding, and the order entered thereon, entitled the employee to 80½ weeks of compensation from the date of maximum recovery (from Dec. 16, 1957 to July 3, 1959). We presume that the injured employee was paid temporary disability compensation from the date of the injury to the date to maximum recovery (July 18, 1957 to Dec. 16, 1957), as there is nothing in the record furnished us specifically answering this question.

The finding of the deputy commissioner, as above, and the order thereon, providing for the payment of the compensation in a lump sum was nevertheless the payment of workmen's compensation for the time beginning on December 16, 1957 and extending to July 3, 1959. Compensation for permanent partial disability is measured by the provisions of §440.15(3), F. S. The lump sum payment of the compensation found to be due because of the permanent partial disability was authorized by §440.20(1), F. S. The amount of such payments is measured by the "present value of all future payments of compensation computed at four per cent true discount compounded annually"

Section 122.03(8), F. S., provides that "any state or county officer or employee who is receiving workmen's compensation payments may contribute to the retirement fund *during the time such compensation is being received*. The amount of contribution shall be based on the last full month's salary received prior to the date of injury. Any officer or employee making the required contribution shall be allowed credit for such period *not to exceed three hundred fifty weeks*." This subsection permits the injured person to make contributions to the retirement fund and receive service credit "during the time such compensation is being paid . . . not to exceed three hundred fifty weeks." Here the injured employee received compensation for a period of 80½ weeks, from Dec. 16, 1957, for a permanent partial disability resulting in a 23% loss of earning capacity. There is little, if any, doubt that the employee would have been under §122.03(8), F. S., had he been paid in monthly installments instead of a lump sum. To hold that said §122.03(8) is only applicable when monthly installments are paid and not when the compensation is paid in a lump sum would raise a serious question of equal protection of the law as between the two classes. The statute provides such right "during the time such compensation is being paid," and the statutes provide for both installment and lump sum payments. Compensation is paid for the same period, whether paid in installments or in a lump sum. Although the compensation may be received in a lump sum, it is nevertheless for the duration of the injury as measured by the workmen's compensation law, as it would be if paid in installments.

Doubtless said §122.03(8), F. S., was designed to permit a person to continue to receive retirement service credit during the

time he is away from his employment because of injuries and drawing compensation under the workmen's compensation act, upon his complying with said §122.03(8). Should a person entitled to permanent partial disability compensation return to work while receiving permanent partial disability compensation, said statute will permit him to continue to make compensation payments and receive the service credits contemplated by said §122.03(8); however, he may not receive credit in excess of credit mentioned in said section. He may not receive the credit accorded him under said §122.03(8) and in additional credits based on his compensation for reemployment during the time mentioned in said §122.03(8). Should he be employed by another state or county department or agency, after receiving such partial disability, at a salary in excess of that received by him prior to injury, then his contributions to the retirement system and his service credits would be measured by such subsequent employment and not by §122.03(8), F. S. He would not be entitled to both where contributions under subsequent employment exceeded those under said §122.03(8).

We, therefore, hold that the phrases "during the time compensation is being received . . . not to exceed three hundred fifty weeks," extends not only where such compensation is being paid in installments but also where paid in a lump sum.

The above stated question is answered in the affirmative; provided, if the employee has been on active duty for the state or county during said period of time the above observations covering such cases must be taken into consideration.

058-336—December 16, 1958

REGULATION OF VOCATIONS AND PROFESSIONS

PRACTICE OF MEDICAL ANESTHESIA BY DENTIST LICENSED TO PRACTICE IN FLORIDA—§§466.03(2), 466.04, 466.14 AND 466.24, F. S.

To: *Homer L. Pearson, Secretary-Treasurer, State Board of
Medical Examiners, Miami*

QUESTION:

May a dentist licensed to practice in Florida and who has completed satisfactorily a qualified residency in anesthesiology, including all phases of medical anesthesia in a university hospital, engage in the private practice of medical anesthesia without being licensed by the state board of medical examiners?

Chapter 466, F. S., relating to the practice of dentistry in Florida, provides, among other things, in §466.03(2), relating to persons exempt from the provisions of said chapter, as follows:

Nothing in this chapter shall apply to the following practices, acts, and operations:

(2) To the giving by a qualified anaesthetist or registered nurse of an anaesthetic for a dental operation under the direct supervision of a licensed dentist;

Section 466.14, F. S., relative to examinations to be given by the state board of dental examiners, provides, among other things, as follows:

. . . Such examination shall be oral, written, theoretical, practical and clinical, and of such a character as

to thoroughly test the qualification of the applicant to practice dentistry, and shall be taken from the following subjects . . . anaesthesia . . . and such sub-divisions of these general subjects as relate to the practice of dentistry. . . .

Section 466.24 F. S., relating to the cause for revocation of certificate to practice dentistry, provides, among other things, as follows:

Whenever it shall be established to the satisfaction of the board, . . . that any licensed dentist or dental hygienist . . . has been guilty of . . . the use of advertising in which reference is made to any anaesthetic, drug, formula, material, medicine, method, system, or mechanical or electrical device used or to be used; . . . the board shall suspend or revoke the license of such person. . . .

Section 466.04, F. S., relating to what constitutes the practice of dentistry, provides, among other things, as follows:

Any person shall be deemed to be practicing dentistry . . . who administers an anaesthetic of any nature in connection with a dental operation. . . .

The fact that standard and medical dictionaries fail to define medical anesthesia indicates that *medical anesthesia* is a relatively new phase in the field of specialized medicine, which has developed very rapidly over the last few years. Therefore, it is necessary to define the two words separately.

The word *medical* has a very broad meaning and is defined in *Words and Phrases*, Vol. 26A, p. 608 as:

Of, pertaining to, or having to do with the art of healing disease, or the science of medicine; as the medical profession, medical services, a medical dictionary, medical jurisprudence. Containing medicine; used in medicine; medicinal, as the medical properties of a plant. *Webst. Dict.*

Anesthesia is defined in Webster's new international dictionary, 2nd Ed., as:

Entire or partial loss or absence of feeling or sensation; a state of paralysis of the sensory apparatus. It may be produced by the administration of an anesthetic, by disease, or sometimes by hypnotism.

The court said in *International Travelers' Ass'n v. Yates*, 29 S.W. 2d 980, 981, that:

Administration of anesthetic preparatory to operation for abscessed tonsil held "medical treatment" within exception of accident policy.

The court held in *Order of United Commercial Travelers of America v. Shane*, 64 F. 2d 55, 59, as follows:

Death caused, because of idiosyncrasy as to butyn, when physician administered butyn to insured in proper amount to lessen pain during proposed preliminary examination of posterior urethra, held death from "medical" or "surgical treatment" within exceptions of accident insurance certificate. Administering of drug was in category of medical or surgical treatment, where concededly administered to insured by physician of good standing and where commonly used by physicians for such

purpose, notwithstanding fact that, as found by court, such examination of urethra did not necessarily include administration of local anaesthetic and that it was administered merely for purpose of lessening pain during examination.

In view of the foregoing it is my opinion that a licensed dentist may only practice medical anesthesia in connection with the practice of dentistry, as to practice medical anesthesia as a specialty would be to engage in a specialized field embraced in the practice of medicine for which he does not hold a license.

It is further my understanding that there is no board or state agency authorized to issue a license solely for the practice of medical anesthesia.

Your question is answered accordingly.

058-337—December 17, 1958

TAXATION

LICENSE TAXES—PUBLICATION OF TIP SHEETS—EXEMPTION OF VETERANS—CH. 20731, 1941, "FLORIDA TIP SHEET ACT"; §205.16, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are the enclosed two documents (Illinois Sports News, Turf Flash) "tip sheets," as defined in Ch. 20731, 1941?
2. Is a veteran who possesses the qualifications for tax exemption as set forth in §205.16, F. S., eligible for a \$50 exemption on a "tip sheet" license?

AS TO QUESTION 1:

In answer to your 1st question, you are referred to an opinion and order signed by Circuit Judge George Holt, in and for the 11th judicial circuit of Florida, on Aug. 9, 1955, in chancery case 175111-A, in which the Armstrong Daily Sports, Inc. was plaintiff and Earnest Overstreet, as tax collector of Dade county, was defendant.

In that case Judge Holt upheld the constitutionality of Ch. 20731, 1941, known as the "Florida Tip Sheet Act," and he discarded the argument of the Armstrong Daily Sports, Inc. that its publication was a newspaper and therefore exempt from the license required for tip sheets.

Judge Holt in his opinion also said: "Thus, it is obvious that its paper (referring to Armstrong Daily Sports, Inc.) does not qualify as having a 'bona fide' list of actual prepaid subscribers. Neither can it be said that a publication predominantly devoted to the dissemination of information about horse racing is 'of interest or value to the public generally.'"

What was said in that opinion with reference to the Armstrong Daily Sports, Inc. applies with equal force to the Turf Flash and the Illinois Sports News. There can be no question but that both of these documents give tips and selections of designated horses running at various horse tracks throughout the country.

AS TO QUESTION 2:

Section 5 of Ch. 20731, 1941, requires every person engaged in the business of printing, publishing or selling any prediction of the result of any trial or contest of skill, speed, power or endurance of man, beast or fowl, to pay a state license tax of \$500 and also to pay a county license tax of \$500, and subsection (c) of that section permits cities to impose a license tax on such persons not to exceed \$500 per year.

Section 205.16, F. S., provides that certain disabled veterans are entitled to an exemption to an occupational tax up to the extent of \$50 on any license to engage in any business or occupation in the state which may be carried on mainly through the personal efforts of the licensee as a means of livelihood

Subsection (5) of §205.16, F. S., specifically sets forth several types of licenses to which the exemption shall not apply, but "tip sheets" do not fall in that category and, therefore, it is my opinion that a properly qualified disabled veteran who desires to secure a "tip sheet" license would be entitled to the \$50 exemption.

058-338—December 19, 1958

PUBLIC LANDS AND PROPERTY**PINELLAS COUNTY WATER AND NAVIGATION CONTROL
AUTHORITY—ESTABLISHMENT OF BULKHEAD
LINES UNDER §253.122, F. S.**

To: J. D. Hobbs, County Attorney, Pinellas County, Clearwater
QUESTION:

Can the Pinellas county water and navigation control authority, pursuant to its authority to fix bulkhead lines in Pinellas county, accept a line fixed by a municipality without further advertisement or public hearing?

In answering your question, I assume the hearing held by the municipality and the advertisement pursuant thereto conform with the requirements of §253.122, F. S.

I have held consistently since the enactment of Ch. 57-362, that the Pinellas county water and navigation control authority is the authorized agency to fix bulkhead lines in Pinellas county, including those lines set within municipal limits. In a conference held Oct. 14, 1957 this procedure was confirmed; however, at that time it was agreed by the trustees of the internal improvement fund and the Pinellas county water and navigation control authority that any municipality affected should be consulted and requested to recommend a bulkhead line before it is finally established. This is not a statutory requirement. It is merely designed to give the municipality a voice in fixing the line, but it is not obligatory upon the authority to follow this procedure.

In opinion 058-197, dated June 25, 1958, addressed to the clerk of the circuit court of Pinellas county, I held the Pinellas county water and navigation control authority may refer applications for bulkhead lines to an examiner for his findings of fact and recommendations. I based this conclusion upon the principle that the absence of specific legislative authority does not preclude the use of examiners to determine facts so long as the body upon whom the ultimate decision rests makes the final determination. (See 42 Am. Jur., Public Adm. Law, 141, p. 484.)

In a letter dated Nov. 26, 1958, addressed to Hon. M. A. Braswell, I stated that if the notice and hearing which has been previously held by a municipality comply with the statutory requirements the authority can adopt the line so fixed without the necessity of further advertisement and additional public hearings. I assumed here the authority would accept the line without alteration or change.

With the foregoing in mind and if the public has been given the statutory notice and is aware that the action taken by the municipality is as an examiner or hearer of the facts for the Pinellas county authority, and that the authority will make the ultimate decision, it is my opinion this procedure is proper under the provisions of §253.122, F. S. On the other hand, if the municipality holds itself out as having authority to fix the line without recognizing the authority of the Pinellas county water and navigation control authority, it is my opinion that the public has not been given a proper hearing and notice, for under the controlling statutes the public has every right to expect the water and navigation control authority rather than the municipality to fix the bulkhead line.

I feel the Pinellas county water and navigation control authority must look to the action actually taken by the municipality and determine the above.

Your question is answered accordingly.

058-339—December 19, 1958

TAXATION

TAX-EXEMPT STATUS OF CITY-OWNED PROPERTY UTILIZED AS TOURIST PARK—§§167.09, 192.06(2), 418.02, F. S., AND §1, ART. IX, STATE CONST.

To: William C. Grimes, City Attorney, City of Palmetto, Bradenton
QUESTION:

Has a county the right to assess for state and county taxes city-owned property, which is being used by the city as a tourist park, wherein trailer spaces are rented and other public facilities, such as recreation halls, shuffleboard courts, and the like, are devoted to both the use of residents of the park and the general public?

Section 1, Art. IX, State Const., excepts from taxation "such property as may be exempted by law for municipal, education, literary, scientific or religious purposes." Section 192.06(2), F. S., provides for an exemption from taxation on: "All public property of the several counties, cities, villages, towns and school districts in this state, used or intended for public purposes. . ." (emphasis supplied).

The right to a tax exemption in the instant case turns upon whether the city in using its property as a tourist park, in which trailer space is rented and in which is provided recreation halls, shuffleboard courts, etc., both for residents of the park and the public generally, is subserving a municipal or public purpose. It is said in *State v. McDavid*, 145 Fla. 605, 133 ALR 360, 200 So. 100, 102, that "the time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental, but that concept has been very much expanded and

a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality."

Section 418.02, F. S., 1957, provides:

The governing body of any such municipality or county may dedicate and set apart for use as playgrounds and recreation centers and other recreation purposes, any lands or buildings, or both, owned or leased by such municipality or county and not dedicated or devoted to another or inconsistent public use. . . .

Section 167.09, F. S., which is part of the chapter dealing with general powers of municipalities, provides:

The city or town council or commission, whether created by special act or general law, may lay off such parks, public squares, streets, avenues, lanes, highways, canals, etc., as may seem necessary and expedient for the public health or interest. . . .

Clearly, in light of the above mentioned statute and under the ever broadening concept of what constitutes a municipal or public purpose, as illustrated by the above quoted case, the city of Palmetto, in utilizing city property for purposes as above enumerated, is carrying out a public or municipal purpose. Such property would seem, therefore, to be exempt from taxation under §1, Art. IX, State Const., and under §192.06(2), F. S.

In fully disposing of the instant case, the effect on the tax-exempt status of the property in question of the city receiving rent from the users of the trailer space must be disposed of. Where property owned by a municipality is used primarily for the production of income and profit, the property will not be considered as being held for a public use as required by tax exemption statutes (155 ALR 423). ". . . (A) mere incidental or secondary use of municipal property for public or governmental purposes will not bring the property within a tax exemption where the primary and substantial use thereof is for private gain," (155 ALR 426) (See also: 101 ALR 791; 129 ALR 425).

In an annotation at 3 A.L.R. 1439, 1445, it is said:

Whether the fact that a state or municipality derives an income from property held by it deprives it of its public nature to such an extent as to take it out of the exemption from taxation generally given to state or municipally owned property when devoted to public use necessarily depends on the character of the property and the manner in which the profit or income is earned. As a general rule, it may be said that where the primary and principal use to which the property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to a public use.

The present case is distinguishable from the case of *Park-N-Shop, Inc. v. Sparkman* (Fla.) 99 So. 2d 571, in which it was held that a leasehold interest in county property was not subject to taxation as tangible personal property. The court said there that the criterion in determining the taxable character of such property is the nature to which it is put and not the nature of its ownership. The distinction between the *Park-N-Shop* case and the facts before us is that the property in question is city property which, in order

to be exempt, must be used or maintained for a public purpose. County property under the Park-N-Shop case was "immune" from taxation under the decision of the court.

It therefore follows that if the tax assessor finds that the rent derived by the city from trailer spaces in the tourist park in question is income acquired as an incident to the operation of the tourist park, then the status of the property as tax-exempted, as discussed above, would not be affected by the fact that income is derived from the rent of some of the facilities.

Your question is answered accordingly.

058-340—December 19, 1958

CRIMES

"SWEEPSTAKES" AS VIOLATION OF STATE LOTTERY LAWS

To: A. Sydney Herlong, Jr., Representative, U. S. Congress, Leesburg

QUESTION:

Does the conduct of a "sweepstakes" type of promotion contest constitute a violation of the state lottery laws?

The drawing of a name or number as a means of determining the winner of a prize or prizes falls within the definition of a lottery if the scheme is constituted so as to effect consideration to the promoter. If this be so, the plan would contain the three necessary elements of a lottery (prize, award by chance, and consideration) and would, accordingly, constitute a violation of Florida law. See: Little River Theatre Corp. v. State ex rel. Hodge, 185 So. 855.

In order to determine whether a named plan constitutes a lottery, it is only necessary to ascertain whether or not there is found therein the three elements set out above.

Ordinarily, it is quite easy to determine the existence of a prize or prizes and whether the same is awarded by chance.

Going to the element of consideration, or the flowing of some thing of value or benefit to the sponsor, same may be present within the contemplation of the lottery statutes without direct payment for the right to participate. It was so held in the Little River Theatre Corp. case, above. In that case, the supreme court of Florida held theatre bank night was a lottery even though it was not necessary for a person to buy a theatre ticket or pay for anything in order to participate in the drawing or prizes.

The court held that the element of consideration was present because the scheme advertised the theatre, increased the attendance, and materially enhanced the receipts.

Consequently, in order to find the element of consideration present, it must be established that the plan or scheme, in some manner, causes to flow to the sponsor some added benefit. In many of the popular plans of this type, the contestants are requested to submit boxtops, labels, etc., which clearly illustrate an increased sales benefit to the sponsor. In other cases, the participant is required only to submit his name and address. It is then that the element of consideration becomes more nebulous. However, the benefit to the sponsor is present in the large, widespread attention given the contest and, simultaneously, his product.

Many persons do not understand the technical distinctions out-

lined above which place certain schemes in the prohibited class, however, great care must be exercised by public officials to prevent any such schemes, even though apparently harmless, if violative of law, because of their improper influence and their propensities to cause others to undertake more harmful schemes.

It is my opinion that the "sweepstakes" plan enclosed in your letter contains the three prohibited elements of a lottery referred to, ante, viz.: The prize, I think, is apparent. Equally apparent is the award by chance, there being no mention to the contrary in the contest analysis set out in the advertisement. The consideration flows to the sponsor from the widespread national attention called, not only to the contest itself, but, as well, to the products for which he is known.

058-341—December 22, 1958

CIVIL PRACTICE AND PROCEDURE

DIVORCE—GROUNDS FOR—INCURABLE INSANITY— §§65.04 AND 90.05, F. S.

To: *George J. Emanuele, Director, Medical and Social Services,
Florida Council for the Blind, Tampa*

QUESTION:

May the spouse of a person committed to the Florida state hospital for the insane, with what is diagnosed as incurable insanity, obtain a divorce?

Opinion of the attorney general 049-130, issued March 29, 1949, answered a similar question in the negative.

Section 65.04, F. S., prescribes nine grounds for divorce in Florida. The party seeking the divorce must prove one of these grounds exists or he cannot have a divorce. Insanity is not one of these grounds.

Incurable insanity was made a ground for divorce in 1901, but the statute was repealed by Ch. 5453, 1905.

Notwithstanding the above, a proceeding for divorce may be instituted against an insane person for any ground of divorce accruing while the defendant was sane; his subsequent insanity is not a bar to the action. (*Hayes v. Hayes* (1923), 98 So. 66). (*Merneigh v. Merneigh* (1954), 119 N.E. 2d 492).

It may be noted that insanity of the defendant at the time of trial raises grave difficulties of proof. Section 90.05, F. S., provides that no party to an action shall be examined as a witness in regard to any transaction or communication between such witness and a person who at the time of such examination is insane. This statute applies in a divorce case (*Lorenz v. Lorenz* (1946), 26 So. 2d 54). If therefore the defendant is adjudged insane after the occurrence of the ground for divorce, the complainant cannot thereafter testify as to the defendant's misconduct (*Lorenz v. Lorenz*, supra).

Your question is answered accordingly.

058-342—December 29, 1958

TAXATION

EXCISE TAX ON DOCUMENTS—RENEWAL OF TWO OR MORE NOTES—CONSTRUCTION OF §201.09, F. S.—CH. 201; §201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a single promissory note is given in renewal of two or more notes, so as to extend or continue the existing contractual obligations, is such renewal note entitled to exemption under §201.09, F. S.?

Section 201.09, F. S., provides that "when any promissory note is given in renewal of any existing promissory note, which said renewal note only extends or continues the identical contractual obligations of the original promissory note and evidences part or all of the original indebtedness evidenced thereby, not including any accumulated interest thereon and without enlargement in any way of said original contract and obligation, such renewal note shall not be subject to taxation under this chapter if such renewal note has attached to it the original promissory note" Prior to the adoption of said §201.09, F. S. (Ch. 19068, 1939) renewal notes were subject to taxation under §201.08, F. S. (*Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909). Section 201.09 is, therefore, an exemption from taxation and should be construed and treated as such.

The taxes imposed by Ch. 201, F. S., are excise taxes imposed upon the transaction; in the case of a promissory note it is a tax upon the promise to pay (*Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415). Although it is a general rule of statutory construction that taxing statutes are to be construed strictly against the state or other taxing power and in favor of the person or persons taxed (*Lee v. Gaddy*, 133 Fla. 749, 183 So. 4, text 6; *Atlantic Coast Line Railway Co. v. Amos*, 94 Fla. 588, 115 So. 315) tax exemptions are to be construed in favor of the taxing power and against the exemption claimant (*Green v. Pederson*, 99 So. 2d 292, text 296; *State v. Inter-American Center Authority*, Fla., 84 So. 2d 9, text 16, and authorities therein cited).

"The execution of a note in renewal of a previous one is not a payment of such prior note, nor the creation of a new indebtedness, unless there is an express agreement to that effect by the parties" (*Board of Public Instr. v. State*, 145 Fla. 482, 199 So. 760, text 761; *Cheves v. First National Bank*, 79 Fla. 34, 83 So. 870, text 872). However, such "a renewal of a note involves a new contract by the maker or obligor" (*Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, text 910). "Where a note is given merely in renewal of another note and not in payment, the renewal does not extinguish the original debt or note nor in any way change the debt except by postponing the time for payment" (10 C. J. S. 770, §279). A renewal note has been defined as a continuation of an old obligation (*Sproul v. Baskin*, 166 App. Div. 275, 166 N. Y. S. 606) or the reestablishment of a particular contract for another period of time (*King v. Edel*, 69 Ga. App. 607, 26 S. E. 2d 365). In *City National Bank v. Stoeckel*, 103 Conn. 732, 132 A. 20, text 23, it was stated that the term "renewal of note" was not a term of art. The definition of a "renewal note" contained in §201.09, F. S., appears

to be declaratory of the law of bills and notes relative to renewal notes. What would be deemed a "renewal note" under the law of bills and notes would seem to be within the purview of said §201.09. Renewal notes are those made and delivered in lieu of existing notes, based upon the same consideration, and for the purpose of extending the time for payment. Should the new note be given for any additional considerations than those existing under the existing notes then such new notes would not be in law renewal notes.

Upon the maturity of renewal notes the holder thereof may base an action thereon, on the notes that were renewed, or on the original consideration (8 Am. Jur. 443, §790; 10 C. J. S. 1155, §526). To be within §201.09, the total consideration for the renewal note must be that of the existing notes, and the addition of any other or further consideration will take the instrument out of the purview of §201.09, F. S. Should the renewal note be in renewal of an unstamped note, although others were renewed by the same renewal note, it would not be within §201.09, F. S. A new note in renewal of two or more existing notes are nonetheless a renewal note in law and within the purview of §201.09, F. S., so long as it is confined to the renewal of notes duly stamped under Ch. 201, F. S.

The above stated question is answered in the affirmative, subject to the above observations.

058-343—December 29, 1958

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
AUTHORITY OF COUNTY TO PURCHASE IMPROVED REALTY FOR OFFICES WHERE PAYMENT MADE BY DEFERRED INSTALLMENTS—§§125.01(1), 125.22; CH. 135, F. S.

To: Berwick Anderson, County Attorney, Clay County, Green Cove Springs

QUESTION:

May a county purchase a building to provide needed office space for county officials and employees with payment thereof to be made on a deferred installment basis?

The board of county commissioners of the several counties are charged with the duty to build and keep in repair, county buildings (§125.01(1), F. S.) I am of the opinion that this section provides the authority for boards of county commissioners to purchase a building to be used for needed office space for county officials and employees, provided the board of county commissioners by resolution determine that the best interest of the county may be served by such purchase rather than the construction of the needed facilities.

In connection with the financing of such a purchase I point out that the counties have historically conducted their financial affairs on a cash basis, paying their obligations on the due date. The entire scheme for the administration of county fiscal matters; viz, the budget laws, the taxing power of the counties, authority to issue bonds, revenue certificates or tax anticipation certificates under applicable laws intends that counties have funds on hand to pay their contract obligations as they become due. It is com-

monly understood that contracts contemplate payment to be made when the performance under the contract is completed. Nowhere is to be found constitutional or statutory authority for the boards of county commissioners contracting for property or services to make payment thereof on a deferred basis.

In order to provide funds necessary for counties to make cash payment of their obligations they have been authorized to anticipate future tax revenues by issuing bonds subject to the limitation of §6, Art. IX, State Const., that such bonds be approved by the freeholders of the county. A line of early cases beginning with *Tapers v. Pichard*, 124 Fla. 549, 169 So. 39, gives recognition to an exception to the constitutional requirement of freeholder election where essential county buildings are constructed under the provisions of the present Ch. 135, F. S. However, more recent cases dealing with this subject indicate that any plan of financing even essential county buildings under Ch. 135, unless extremely unusual circumstances exist, may be required to be approved by freeholder election in keeping with the provisions of the organic law (*State v. County of Manatee*, 93 So. 2d 381; *State v. County of Palm Beach*, 89 So. 2d 607, See Dissent; Compare *State v. County of Dade* 92 So. 2d 186).

The constitutional requirement of freeholder election in connection with the anticipation of ad valorem taxes to be levied in the future, apparently extends to any program of financing whereby the ad valorem taxing power of the county may be coerced (*Hollywood Inc. v. Broward Co.* 90 So. 2d 47). Hence, it appears that any plan of financing this proposed purchase which directly or indirectly pledges ad valorem taxes to be levied in the future for the payment thereof must have approval of the freeholders of the county.

Although a county cannot contract to pay for a purchase of this nature over a period of years as can a private corporation, or finance a purchase of this nature by accepted mortgage practices, I am of the opinion that this needed office building could be acquired by the county and payment made therefor, as a county operating expense out of budgeted or anticipated revenues during the current fiscal period with the possibility of carrying over the contract as a budget item in the succeeding years. This could be accomplished under the provisions of §125.22, F. S., which authorize the board of county commissioners to lease needed office space. There is, however, in this section a limitation that such lease shall not extend beyond a two year period.

Notwithstanding the limitation of this section, I believe that the county could enter into a two year lease agreement containing both an option to renew on the expiration date, and an option to purchase the leased property at any time during the two year period, also renewable on the lease expiration date, with the proviso that all moneys paid as rent under that particular lease or any and all prior leases be applied to the purchase price.

Of course, the rentals paid under such an agreement must bear a reasonable relationship to the fair market rental value of the building. This purchase might also be made under a direct lease purchase agreement provided the revenues which will be available annually to the county are found to be sufficient to meet the current expenses, including amounts to become due under such contracts (*State v. City of Miami* 7 So. 2d 146; *Hath-*

away v. Munroe 97 Fla. 28, 119 So. 149).

Thus, although the county may not purchase a building needed for necessary office space for county officials and employees with payment thereof to be made on a deferred installment basis, the comments herein provide the formula which, in my opinion, will enable the county to acquire this needed facility.

058-344—December 29, 1958

TAXATION

EXEMPTIONS—HOSPITALS OPERATED BY FOREIGN NON-PROFIT CORPORATIONS—§1, ART. IX AND §16, ART. XVI, STATE CONST.; §192.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are foreign nonprofit corporations, duly licensed to transact business within this state, operating hospitals in this state, entitled to exemption from ad valorem taxes on their hospital properties in this state?

Under §1, Art. IX, State Const., the legislature is authorized to exempt such property as may be owned and used for educational, literary, scientific, religious and charitable purposes. Under §16, Art. XVI, State Const., all property of corporations in this state is subject to taxation "unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." See also §192.06, F. S., upon the same general subject. Under these constitutional and statutory provisions *ownership and utilization* of the property are the criteria for determining its exemption from taxation (*Riverside Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. John*, 143 Fla. 544, 197 So. 131; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78; *Orange County v. Orlando Osteopathic Hospital*, Fla., 66 So. 2d 285). Ownership for the purpose of some religious, scientific, municipal, educational, literary or charitable purpose, is not sufficient of itself to entitle a claimant to the exemption; there must also be *utilization* for one or more of such purposes.

Orange County v. Orlando Osteopathic Hospital, supra, involved a hospital of a nonprofit corporation organized and existing under the laws of Florida. The corporate charter in this case required that the corporation "use and expend all surplus moneys and funds for the purpose of improving, enlarging the said hospital and hospital equipment." No profits from the operation of the hospital were turned back to its members. Whenever any surplus income accrued, it was used to purchase additional facilities and equipment and in the expansion of hospital services. During an eight-year period an average of 34.19% of the net income of the hospital was used to treat charity patients; this did not include out-patient charity treatments. The opinion in this case cites as authority for the opinion *Lutheran Hospital Ass'n v. Baker*, 40 S. D. 226, 167 N. W. 148, where there were 95% pay patients and 5% charity patients, and *Tulsa County v. Sisters of the Sorrowful Mother*, 141 Okla. 32, 283 P. 984, where there were 50% full pay patients, 20% part pay patients, and 30% charity patients. These cases held the hospitals entitled to tax exemption on the ground they were charitable

institutions. The fact that a hospital receives compensation from those patients able to pay for services does not prevent such hospital being classified as a charitable institution (Annotations in 34 A. L. R. 637, 62 A. L. R. 330 and 108 A. L. R. 286; *Orange County v. Orlando Osteopathic Hospital, Fla.*, 66 So. 2d 285, text 288).

Anyone interested in the question before us should carefully read the court's opinions in *Orange County v. Orlando Osteopathic Hospital*, *supra*, and *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211. The fact that the first case above mentioned involved an osteopathic hospital does not alter the legal question and the rules therein announced would be applicable to other hospitals.

The above authorities lead to the conclusion that a foreign non-profit corporation, duly licensed to transact business within this state, operating a hospital in this state would be entitled to exemption from ad valorem taxes if, and only if, such hospital is held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. Whether the hospital is held and used exclusively for one or more of such purposes is largely a question of fact to be determined by the tax assessor, and in case of an appeal to the board of equalization by the county commissioners, under the above mentioned rules and regulations, and especially those appearing in the opinion in *Orange County v. Orlando Osteopathic Hospital, supra*.

058-345—December 30, 1958

TAXATION

OCCUPATIONAL LICENSE TAXES—FEDERAL SAVINGS AND LOAN ASSOCIATIONS—§1464, TITLE 12, U. S. CODE

To: *City of Punta Gorda*

QUESTION:

Are federal savings and loan associations liable for municipal occupational taxes?

Federal savings and loan associations are organized and operate under the provisions of §1464, title 12, of the U. S. code, subdivision (h) of which, in so far as it relates to state and local taxation, provides:

... no state, territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

Such savings and loan associations are instrumentalities of the U. S. and as such free from state and local taxation, except to the extent permitted by congress (*State v. Minnesota Fed. Savings and Loan Ass'n*, 218 Minn. 229, 15 N. W. 2d 568; *Commissioner of Corporations and Taxation v. Flaherty*, 306 Mass. 461, 28 N. E. 2d 433). This is in accord with the general rule on the question of taxing federal governmental agencies and instrumentalities (51 Am. Jur. 278-280, §218; 84 C. J. S. 391 ff, §§206 and 207). The rule has been extended to license and privilege taxes (53 C. J. S. 557 and 558, §29; 33 Am. Jur. 334 and 335, §14). The rule applies to license taxes imposed by municipalities (*Shelbyville v. Citizens Bank*, 272 Ky. 559, 114 S. W. 2d 719; *Bank of America v. Lima*, DC Mass., 103 Fed. Supp. 916).

In the light of these authorities and subdivision (h) of §1464, title 12, of the U. S. code, no municipality may impose any license and license tax upon federal savings and loan associations "greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." The above question is, therefore, answered in the affirmative so long as the occupational license tax imposed is no greater than that imposed by the municipality "on other similar local mutual or cooperative thrift and home financing institutions." If no license tax is imposed on such other thrift and home financing institutions then none may be imposed on the federal savings and loan associations.

058-346—December 30, 1958

TAXATION

COUNTY TAX ASSESSORS—COMPENSATION FOR ASSESSORS UNDER INVALID LAW—CH. 30275, 1955; §§193.20, 193.65; §30, ART. IV, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a county tax assessor was required, by an act of the legislature, to assess on his tax roll the lands of the game and fresh water fish commission in his county, which act, subsequent to the making of such assessment and after the tax roll had been equalized, approved and delivered to the tax collector, was held to be violative of the state constitution and invalid, is such tax assessor entitled to commissions for making such assessments?

County tax assessors in this state are compensated under §193.65, F. S., upon the basis of the total amount of the taxes assessed, both as to general county taxes and as to district taxes. Such commissions are based on the totals of the levies made, not on the number of entries made, number of words or sentences used, pages in the tax roll, etc. The taxes actually assessed are the measure for determining the commissions to be paid the tax assessor for his services. The county tax assessor when making up the tax roll is required to "list all land not subject to taxation belonging to the state, the common school fund, the seminary fund, the internal improvement fund, and the United States, but he shall place no value on any such lands or make any extension of taxes, and shall receive no compensation for listing such lands . . ." (§193.20, F. S.).

Chapter 30275, 1955, in effect required that the game and fresh water fish commission of this state make annual payments to Charlotte county, *in lieu of taxes*, in accordance with the formula contained in the said act. The said commission was, at the time of the enactment of said Ch. 30275, and still is, seized and possessed of some 60,000 acres of land in said county, used and administered in connection with its administration of §30, Art. IV, State Const. Said Ch. 30275 in effect required the county tax assessor of said county to place said 60,000 acres of land upon the tax roll annually from and after its effective date. Upon entering the said lands upon the tax roll the tax assessor was to give it a value comparable to that given like and similar lands in the county, and place the valuation of the lands upon the tax

roll at 50% of such value found as aforesaid. The tax assessor was required to extend county and district taxes on the said tax roll based on this 50% of assessed value. There was a further limitation upon the taxes to be collected from the said commission in that the taxes collected were not to exceed 50% of the income from the lands themselves. Actually said Ch. 30275 merely required that the tax assessor, in addition to listing the lands on the tax roll as required by §193.20, should fix the value of the lands in accordance with said chapter and extend the taxes thereon.

Previously an attempt to assess the same lands for county and district taxes had been held violative of the provisions of said §30, Art. IV, State Const. (*State v. Webb*, Fla., 49 So. 2d 93), on the ground that "the funds resulting from the operation of the commission and from the administration of the laws and regulations . . . "were earmarked for specific purposes and may not be used for the payment of taxes." In *State v. Alford* (decided Nov. 26, 1958, but not yet reported) the supreme court held said Ch. 30275 likewise violative of §30, Art. IV, State Const., and ineffective for the purposes intended. However, the county assessor of taxes had, prior to the time the act was held invalid and prior to the bringing of the proceedings thereon, fully complied with the requirements of the said act and had entered the lands on the tax roll, all in accordance with the said act and the directions thereof.

"It is well settled in this state that a statute found on the statute books must be presumed to be valid and given effect until it is judicially declared unconstitutional" (*City of Sebring v. Wolf*, 105 Fla. 516, 141 So. 736, text 737). "The rule that an unconstitutional law is a nullity cannot be applied to work hardship and impose liability on a public officer who, in performance of his duty, has acted in good faith in reliance on the validity of a statute before any court has declared it invalid." (16 C. J. S. 480, §101). A tax collector is not personally liable for tax moneys collected by him under an unconstitutional law where the payment was not made under protest (16 C. J. S. 480, note 85).

The supreme court of Kentucky, in *Powers v. Osborn*, 118 Ky. 810, 82 S. W. 419, and *Oates v. Simpson*, 295 Ky. 433, 174 S. W. 2d 505, held that the tax assessor was not entitled to commissions on assessments made by him but subsequently changed by the granting of exemptions allowed by law, to the extent of the exemptions. To the same effect see also *Berry v. Missoula County*, 6 Mont. 121, 9 P. 899, where the total assessment was reduced by reason of an allowance of a railroad right of way exemption subsequent to the making of the assessment. The tax assessor was held not entitled to commissions on a reduction of total taxes by reason of the allowance of exemption of mortgages held by non-residents (*Holland v. Board of Commissioners*, 15 Mont. 460, 39 P. 575). The effect of the opinion in *State v. Alford*, supra, holding the tax or payment in lieu of taxes imposed by Ch. 30275, 1955, to be unconstitutional and invalid was to reduce the total taxes imposed under the tax roll in question upon which the commissions imposed by §193.65, F. S., for the tax assessor are calculated. Unless this construction would work a hardship upon the tax assessor, within the purview of the rule announced in 16

C. J. S. 480, §101, above mentioned, he is not entitled to any commission thereon.

Under §193.20, F. S., the tax assessor was required to list the lands of the game and fresh water fish commission on the county tax roll, but was not to list the valuation of the lands or extend the taxes thereon; however, under Ch. 30275, 1955, he was required to determine the taxable value of the lands, as compared to like and similar lands subject to taxation, and enter 50% of such values on the tax roll and extend a tentative tax thereon as in case of other taxable properties. This tax assessment was tentative under the said act because of the limitation based on the income from the lands. The additional services required by the tax assessor were in law not an extension of a tax but the calculation of a payment in lieu of taxes, and, therefore, not technically within the purview of §193.65, F. S.

Failing to find any statute providing compensation for the tax assessor under the circumstances, other than §193.65, F. S., which is based upon the total taxes assessed on the tax roll, which were in effect reduced by the opinion invalidating the assessment in question, we answer the above stated question in the negative.

058-347—December 31, 1958

TAXATION

CANCELLATION OF MURPHY ACT TAX CERTIFICATES
HELD BY MUNICIPALITY—§§95.021, 95.11(1), 192.351-192.353,
194.58, 194.59 AND 196.12, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May tax sale certificates purchased by a municipality under the provisions of the Murphy act (Ch. 18296, 1937) be cancelled without the consent of the said municipality?

The last date that tax sale certificates could have been sold under the Murphy act was on June 9, 1939, and no such certificate bearing date later than June 9, 1935 was subject to sale under the said act. Any certificate sold under the Murphy act would now be more than 20 years of age, from its date of issuance, although not necessarily from date of sale under the Murphy act.

Section 95.021, F. S., makes applicable to the state and each county and municipality existing 20-year statutes of limitations of this state applicable to individuals, firms and corporations. The 20-year statute of limitation contained in §95.11(1), F. S., has never been applied to or deemed applicable to tax sale certificates and tax liens. Section 196.12, F. S., is a 20-year statute of limitation applicable to tax sale certificates and tax liens; however, the last paragraph of said section excludes tax sale certificates purchased under the Murphy act (Ch. 18296, 1937). Although §196.12, F. S., may be applicable to municipalities, under and through §95.021, F. S., it cannot be applicable to Murphy act certificates because §196.12 excludes such certificates from its operation.

Although §194.58, F. S., on its face purports to authorize the cancellation of all tax sale certificates "after the expiration of twenty years from the date of issuance," an examination of §192.36,

fixing a limitation of 10 years on certain Murphy act certificates from date of sale before a tax deed might be applied for, which may not have run prior to the effective date of §194.58, which was Jan. 1, 1948 (see Ch. 23828, 1947), and which if §194.58 be construed as applicable to them, could never be enforced, thereby raising questions of due process of law and effect on contractual relations. When Ch. 23828, 1947, is examined, we find that it contains the following preamble:

WHEREAS, under the provisions of Chapter 19515, Laws of Florida, Acts 1939 Legislature being Section 196.12, Florida Statutes 1941, a period of 20 years from the date of issuance thereof is declared to be the life of any tax sale certificate issued against any lands in the State of Florida, whether issued for State, County or Municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, and no action on such certificate may be maintained after such lapse of time and no tax deed may issue thereon,

AND WHEREAS, in the interest of the public, and of orderly efficient administration of the office of the Clerk of the Circuit Court, provision should be made to note the cancellation or invalidity of such tax sale certificates upon the official records in the office of the Clerk of the Circuit Court,

From the above and foregoing observations it seems clear that §194.58, F. S., was intended as a cancellation of those tax sale certificates barred by the limitations of §196.12, F. S. (see Ops. Atty. Gen., 1953-4, p. 241; 1948 p. 211; 1947 p. 215).

Sections 192.351, 192.352 and 192.353, F. S., appear to be a limitation against the enforcement of tax sale certificates, purchased under the Murphy act, "from and after midnight June 30, 1956," when held "*by private holders, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise.*" It is doubtful that these sections are applicable to a municipality. The government and its agencies "are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." (82 C. J. S. 554, §317). The opinion of this office of July 31, 1956, (056-217; Op. Atty. Gen. 1955-6, p. 746) holds these sections inapplicable to Murphy act certificates held by municipalities. Section 194.59, F. S., relates to tax sale certificates "held by any private holder, natural or corporate, partnership, trustee estate of deceased person, or other person or persons under disability or otherwise," so that it is not applicable to tax sale certificates held by municipalities, if otherwise applicable.

None of the above statutes of limitation or of nonclaim, as well as statutes for the cancellation of tax sale certificates, being applicable to Murphy act certificates held by municipalities, and finding no other applicable provision of the statutes of this state cancelling or barring the enforcement of the tax sale certificates in question, the above stated question must be answered in the negative. Because there may be some doubt in the minds of some as to the enforcibility of such Murphy act certificates it would

be our suggestion that should a municipality desire to enforce the lien thereof that the same be done in equity instead of an application for tax deed, so that title under the enforcement of such tax sale certificate may be set at rest.

058-348—December 31, 1958

TAXATION

STATE AND COUNTY, OR COUNTY TAX SALE CERTIFICATES MORE THAN TWENTY YEARS OLD—§§95.021, 193.04, 193.54, 194.47, 194.58, AND 196.12, F. S. AND §2, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. May a county foreclose state and county, or county, tax sale certificates more than 20 years old?
2. If the 1st question is answered in the negative, then may the record of such tax sale certificates be cancelled by the clerk, or notations be made thereon?
3. Is a clerk of the circuit court entitled to a fee for cancelling such tax sale certificates or making a notation thereon?

Under the Futch acts (Chs. 16252 and 17400, 1933 and 1935), the Murphy act (Ch. 18296, 1937) and §193.04, F. S., only tax sale certificates issued since June 9, 1935, are or may be outstanding in the hands of the state or a county. The 20-year limitation mentioned would bar only those tax sale certificates, if at all, issued prior to this date 20 years ago; that is those issued in 1935, 1936, 1937 and 1938. State ad valorem taxes were abolished as of Dec. 31, 1940, by constitutional amendment (1938 and 1940 amendments of §2, Art. IX, State Const.). Tax sale certificates, after the enactment of §14, Ch. 20722, 1941 (§193.54, F. S.), were bid off, in case of no other bidders, to the county, instead of to the state as prior thereto. The tax sale certificates here considered were all bid off and held by the state at the time of the adoption of said Ch. 20722, 1941.

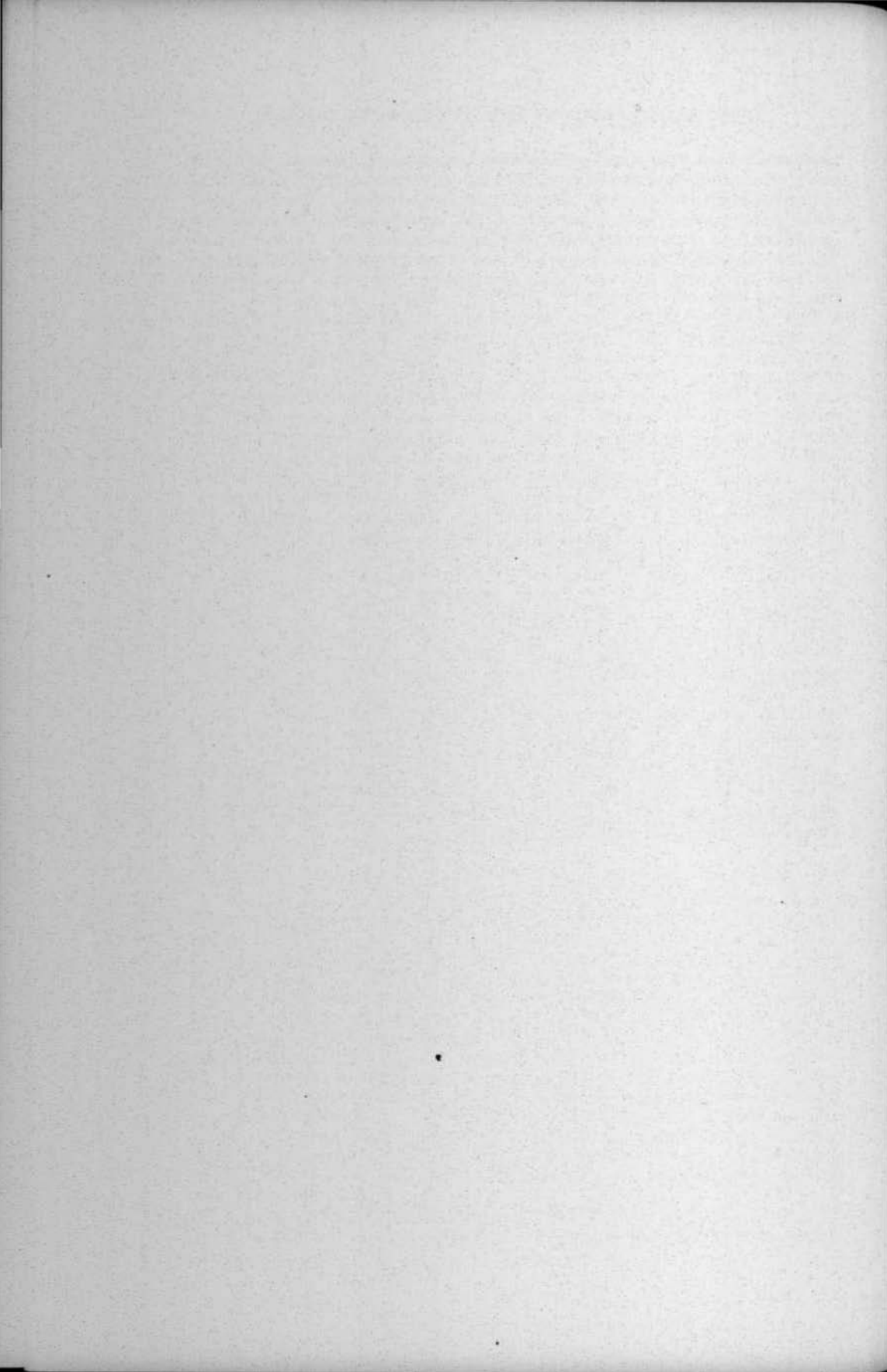
The court, in *Leon County v. Crawford*, 153 Fla. 604, 15 So. 2d 321, held that tax sale certificates issued in 1941 for 1940 taxes, should be included in a county foreclosure under §194.47, as amended by Ch. 22079, 1943, and in *Coughlin v. Broward County*, 156 Fla. 298, 22 So. 2d 814, held that tax sale certificates, sold to the state, in 1939 for 1938 taxes, should likewise be included in foreclosures under said §194.47. The tax sale certificates mentioned in the 1st question should have long since been included in a county foreclosure, and may still and should be unless barred by statutes of limitations or of nonclaim. In the light of the cases hereinabove mentioned in this paragraph it was the continuing duty of the clerk of the circuit court to certify these tax sale certificates to the county commissioners, under §194.47, F. S., and the duty of the board of county commissioners to include such certificates in their foreclosures under said §194.47, and failure to do so probably constituted neglect of duty. This brings us to the question of limitations or of nonclaim.

"A period of twenty years is declared," by §196.12, F. S., "to be the life of any tax certificate issued against any lands in the state,

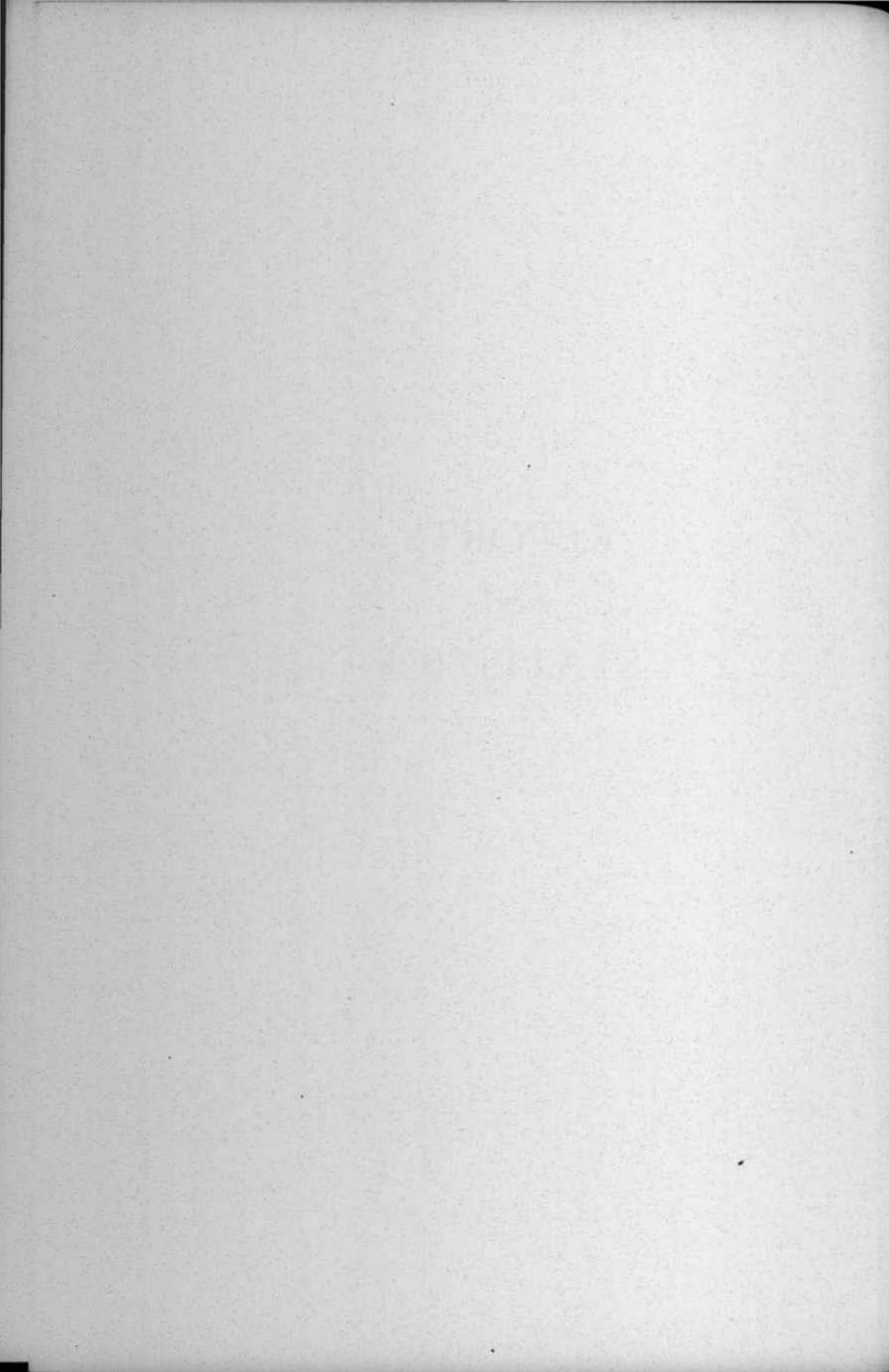
whether issued for state and county taxes or issued by a municipality for municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability or otherwise . . ." but not including tax sale certificates purchased under the Murphy act. The tax sale certificates here involved were not under the Murphy act and are therefore not within the said exemption. This statute was held valid in *Campbell v. Horne*, 147 Fla. 523, 3 So. 2d 125. Under §95.021, F. S., "the provisions of existing law, whether provided for in this chapter or any other chapter, whereby an action is barred if not commenced within twenty years, shall apply to any action by the state . . . or by any county or municipal corporation of the state." It therefore appears that §196.12, as implemented by §95.021, would be applicable to state and county, or county, tax sale certificates held by a municipality, when not also within Murphy act. This seems to lead to a negative answer to the 1st question, at least when the statutes are pleaded by the defendant interested in the lands described in such certificates.

Section 194.58, F. S., makes provision for the cancellation of tax sale certificates barred under §196.12, above mentioned (1948 Op. Atty. Gen. 211; 1953-4 Op. Atty. Gen. 214). The county held tax sale certificates in excess of 20 years of age being subject to cancellation by §196.12, F. S., as implemented by §95.021 of said statutes, would, in the light of the close relation of §194.58 to said §196.12, be subject to cancellation thereunder. We feel that the provision in §194.58, allowing the clerk a fee for making notations of cancellation of barred certificates, would likewise be applicable.

In the light of the above and foregoing we feel that the 1st question should be answered in the negative, the 2nd and 3rd in the affirmative. We have not considered any possible liability of the clerk for failure to certify the tax certificates to the board of county commissioners, under §194.47, F. S., before they became barred by the limitations or of the county commissioners, where such certificates were certified to them under §194.47, to foreclose them as provided in said §194.47.



**REPORTS
AND
STATISTICS**



CONSTITUTIONAL AND STATUTORY DUTIES OF ATTORNEY GENERAL

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al v. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the

courts of the state or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01, F. S., and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (§16.06).

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the Statutory Revision Department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.51).

8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).

9. Participate with other states in preserving the constitutional integrity of the state (§16.52).

10. Approve the bond of the comptroller (§17.01).

11. Legal advisor to the state auditing department (§21.091).

12. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).

13. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the adjutant general's office for military purposes (§73.22).

14. Conduct quo warranto proceedings (§80.03).

15. Represent the state in proceedings under the Declaratory Judgment Law where the constitutionality of statutes is involved (§87.10).

16. Devise a suitable seal for the supervisors of registration (§98.341).

17. Examine audited reports of state executive committee and file same as public record (§103.121).

18. Approve title to real estate in which the state is interested (§135.16).

19. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy Act lands (§196.21).

20. Assist in the collection and enforcement of retail store license taxes (§204.13).

21. Prepare contracts for purchase of uniform school books (§233.16).
22. Approve school district bonds (§236.48).
23. Prosecute violations of school budget law (§237.23).
24. Legal advisor to board of trustees of the Teachers Retirement System (§238.03(9)).
25. Represent Board of Control in eminent domain proceedings (§240.14).
26. Conduct condemnation proceedings on behalf of the armory board (§250.40).
27. Act as ex officio member and legal advisor of the State Civil Defense Council (§252.05).
28. Pass upon and approve regulations of district drainage board (§298.53).
29. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§334.18).
30. Act as attorney for the Railroad and Public Utilities Commission (this work is negligible because of the fact that the Railroad and Public Utility Commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.62, 350.66).
31. Assist Railroad and Public Utilities Commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).
32. Give special attention to legal proceedings in connection with the salt water fishing industry (§370.02(8)).
33. Attend to all legal business arising in connection with the laws governing the salt water fishing industry and State Board of Conservation (§370.02(8)).
34. Enforce the Vital Statistics Law (§382.37).
35. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).
36. Represent the state in disbarment proceedings in the supreme court (§454.28).
37. Assist in the enforcement of the Basic Science Law (§456.22).
38. Institute proceedings in the name of the state for the purpose of recovering monies due the state from any medical scholarship recipient (§458.083).
39. Assist in the enforcement of laws regulating the practice of optometry (§463.19).
40. Institute proceedings in the name of the state for the purpose of recovering monies due the state from any dental scholarship recipient (§466.45).
41. Represent the State Board of Architects in judicial proceeding to which the board may be a party, however, the board is authorized by statute to secure other legal advice or service (§467.14).
42. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

43. Legal advisor and represent watchmakers commission in all courts and in all legal matters affecting commission (§489.10).

44. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

45. Assist in the enforcement of laws regulating small loan businesses (§516.23).

46. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

47. Investigate and rectify commercial discriminations (§§540.02-540.05).

48. Enforce the anti-trust laws of the state (§542.03).

49. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

50. Prosecute combinations against Florida meats (§544.02).

51. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

52. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).

53. Represent the commissioner of agriculture in connection with the enforcement of Florida seed certification law (§575.08).

54. Act as legal advisor and attorney for the State Plant Board (§581.02).

55. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

56. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

57. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

58. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and non-profit cooperative associations (§§618.23, 619.09).

59. Sue to recover fines for doing business without a license (§625.17).

60. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).

61. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).

62. Represent the insurance commissioner in connection with insurance matters (§637.54).

63. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).

64. Bring proceedings to recover escheated property (§731.33).

65. Bring proceedings to forfeit prize money in lotteries (§849.12).

66. Represent state in all appeals from judgments of forfeiture of gambling devices to the supreme court (§849.42).

67. Subversive activities, enforcement of laws re (§§876.22-876.31).

68. Conduct extradition hearings for the governor (§941.04).
69. Act as attorney for the Parole Commission (§947.11).
70. Legal advisor to department of corrections (§944.52).
71. Furnish legal services to division of mental health (§965.01).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).
2. State Board of Education (Fla. Const. §3, Art. XII, §229.15, Florida Statutes).
3. Interstate Cooperation Commission (§13.05, Florida Statutes).
4. Trustees of Internal Improvement Fund (§253.02, Florida Statutes).
5. State Board of Drainage Commissioners (§298.69, Florida Statutes).
6. State Budget Commission (§216.01, Florida Statutes).
7. State Board of Conservation (§§370.02(1), Florida Statutes).
8. State Board of Pardons (Fla. Const. §12, Art. IV).
9. State Canvassing Board (§102.111, Florida Statutes).
10. Florida Securities Commission (§517.03, Florida Statutes).
11. Railroad, etc., Assessment Board (§195.01, Florida Statutes).
12. Board for fixing values of investment securities of trust companies (§660.08, Florida Statutes).
13. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes).
14. State Housing Board (§424.04, Florida Statutes).
15. Department of Public Safety Executive Board (§321.01, Florida Statutes).
16. State Board for Vocational Education (§229.08(9), Florida Statutes).
17. State Board of Trustees of Teachers Retirement System (§238.03, Florida Statutes).
18. State Textbook Purchasing Board (§233.13, Florida Statutes).
19. State Purchasing Commission (§287.031, Florida Statutes).
20. Member of State Civil Defense Council (§252.05, Florida Statutes).
21. Governor's Cabinet (Fla. Const. §20, Art. IV).
22. Judicial Council (§43.15, Florida Statutes).
23. State Merit System Personnel Board (§110.02, Florida Statutes).
24. Sheriffs' Bureau (§30.36, Florida Statutes).

STATUTORY REVISION DEPARTMENT

The 1943 Legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., Florida Statutes). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, Florida Statutes), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundances and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by reviser's bills to be submitted to each session of the Legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the Legislature.

(4) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(5) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) To make a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be

required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general, who, under authority of §16.43, Florida Statutes, selects a director. The director has the direct supervision and control of the department, who with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of reviser's bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The reviser's bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of reviser's bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning only one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation of jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning only one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of reviser's bills, the following rules and procedure are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

(2) A careful search is made for:

(a) Inappropriateness of run-in lines to sections.

(b) Misspelled words and poor punctuation.

(c) Statutes limited as to time of operation and which have expired.

(d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.

(g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.

(i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of the Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the reviser's bills. In the preparation of revisers' bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

**COMPILED STATEMENT OF CASES HANDLED,
OPINIONS AND MISCELLANEOUS LETTERS
WRITTEN IN THE ATTORNEY
GENERAL'S OFFICE**

(From Jan. 1, 1957 Through Dec. 31, 1958)

CRIMINAL CASES

January 1, 1957—cases pending	202	
New Cases—1957	280	
Re-opened cases—1957	17	
		—
Total	297	297
New Cases—1958	276	
Re-opened cases—1958	34	
		—
Total	310	310
		—
Total		809
Closed cases—1957	232	
Closed Cases—1958	300	532
		—
January 1, 1959—cases pending	277	

CIVIL CASES

January 1, 1957—cases pending	318	
New Cases—1957	291	
New Cases—1958	213	504
		—
Total		822
Closed Cases—1957	211	
Closed Cases—1958	204	415
		—
January 1, 1959—cases pending	407	

Opinions—1957	395	Extraditions Approved—1957 ..	420
Opinions—1958	348	Extraditions Approved—1958 ..	500
Total (1957-1958)	743	Total	920
Subjects—1957	522	Extraditions Rejected—1957 ..	35
Subjects—1958	447	Extraditions Rejected—1958 ..	25
Total (1957-1958)	969	Total	60
Miscellaneous letters—1957	15,146		
Miscellaneous letters—1958	16,359		
*Sub-total	31,505		
Statutory Revision Department			
Miscellaneous letters—1957	9,506		
Miscellaneous letters—1958	9,652		
*Sub-total	19,158		
*Total	50,663		
Total Opinions—1957-1958			743
Total Subjects—1957-1958			969
Total Miscellaneous Letters—1957-1958			50,663
Grand Total			52,375

SUMMARY
of
ADVISORY OPINIONS
rendered the
GOVERNOR OF FLORIDA
by the
SUPREME COURT OF FLORIDA
under
ARTICLE IV, SECTION 13,
CONSTITUTION OF FLORIDA
DURING 1957-1958

Prepared by David V. Kerns, Director of Legislative Reference Bureau

(Reported in 91 So. 2d through 106 So. 2d)

Supplementing summaries appearing in Biennial Reports
of the Attorney General of Florida for 1953-1954,
p. 757, and for 1955-1956, p. 995.

ADVISORY OPINIONS

Justices declined to answer, as not within the authorized scope of inquiry, a request for an opinion as to the validity of a group of proposed revisions to the State Constitution, each of which was to be made effective only upon ratification of all. In re Advisory Opinion to the Governor, Florida, 1957, 96 So. 2d 900.

GOVERNOR

Since only regular biennial sessions of the Legislature may be extended by legislative action, power to extend session was spent when regular session ended, making adjournment of extended session at designated time final and giving Governor 20-day period after such adjournment for consideration of bills presented to him. Advisory Opinion to the Governor, Florida, 1957, 95 So. 2d 603.

Governor's authority to call extraordinary reapportionment session expires 30 days after adjournment of Legislature's regular session. However, he could within such period issue call for such session at a definite time thereafter and, if the need for the session ceased to exist, could retract same. Advisory Opinion to the Governor, Florida, 1957, 96 So. 2d 413.

JUDGES

Under amendment revising Article V of Constitution of Florida, adopted at the general election on November 6, 1956, the Governor is authorized to appoint an additional circuit judge for the circuit court of the judicial circuit in which the state capital is located, at any time after the first Tuesday after the first Monday in January, 1957, the term of such circuit judge to commence on July 1, 1957. In re Advisory Opinion to the Governor, Florida, 1956, 91 So. 2d 204.

Vacancies in offices of judges under Article V of State Constitution as revised in 1956 should be filled by appointment only to the first Tuesday following the first Monday in January following the next general election, not to expiration of terms. Advisory Opinion to the Governor, Florida, 1957, 96 So. 2d 541.

For the purpose of determining the population of a judicial circuit under revised Article V of the State Constitution, upon which the number of circuit judges is based, the results of the last census authorized by law in each county in the circuit should be used, though one or more of the censuses is a special one not taken contemporaneously with the censuses in the other counties of the circuit. Advisory Opinion to the Governor, Florida, 1957, 96 So. 2d 546.

The context of a provision of revised Article V of the State Constitution dealing solely with criminal courts of record required an anomalous reference to "county judge" to be read as referring to "judges of the criminal court of record". In re Advisory Opinion to the Governor, Florida, 1957, 96 So. 2d 904.

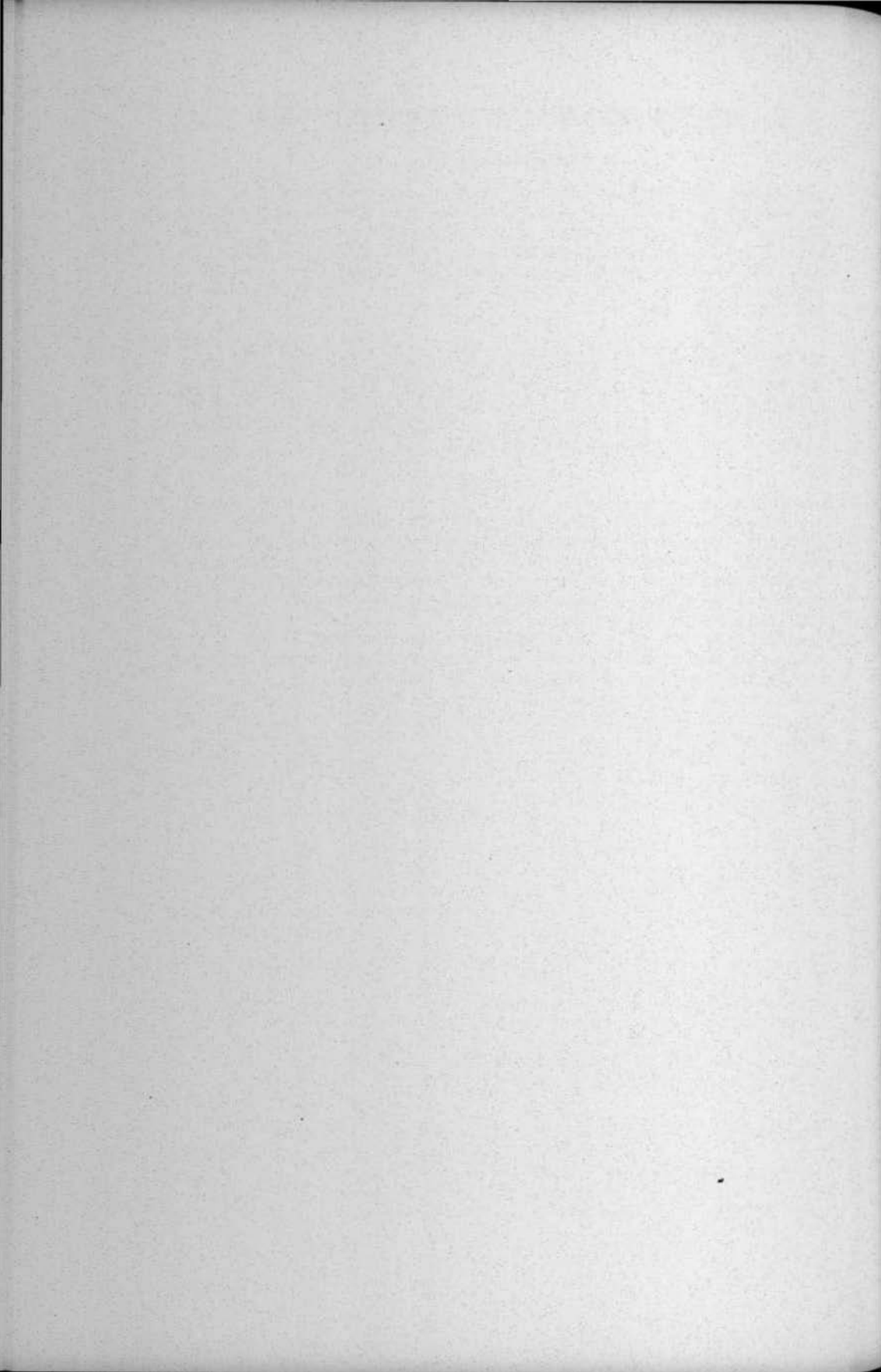
LEGISLATIVE

Since only regular biennial sessions of the Legislature may be extended by legislative action, power to extend session was spent when regular session ended, making adjournment of extended session at designated time final and giving Governor 20-day period after such adjournment for consideration of bills presented to him. Advisory Opinion to the Governor, Florida, 1957, 95 So. 2d 603.

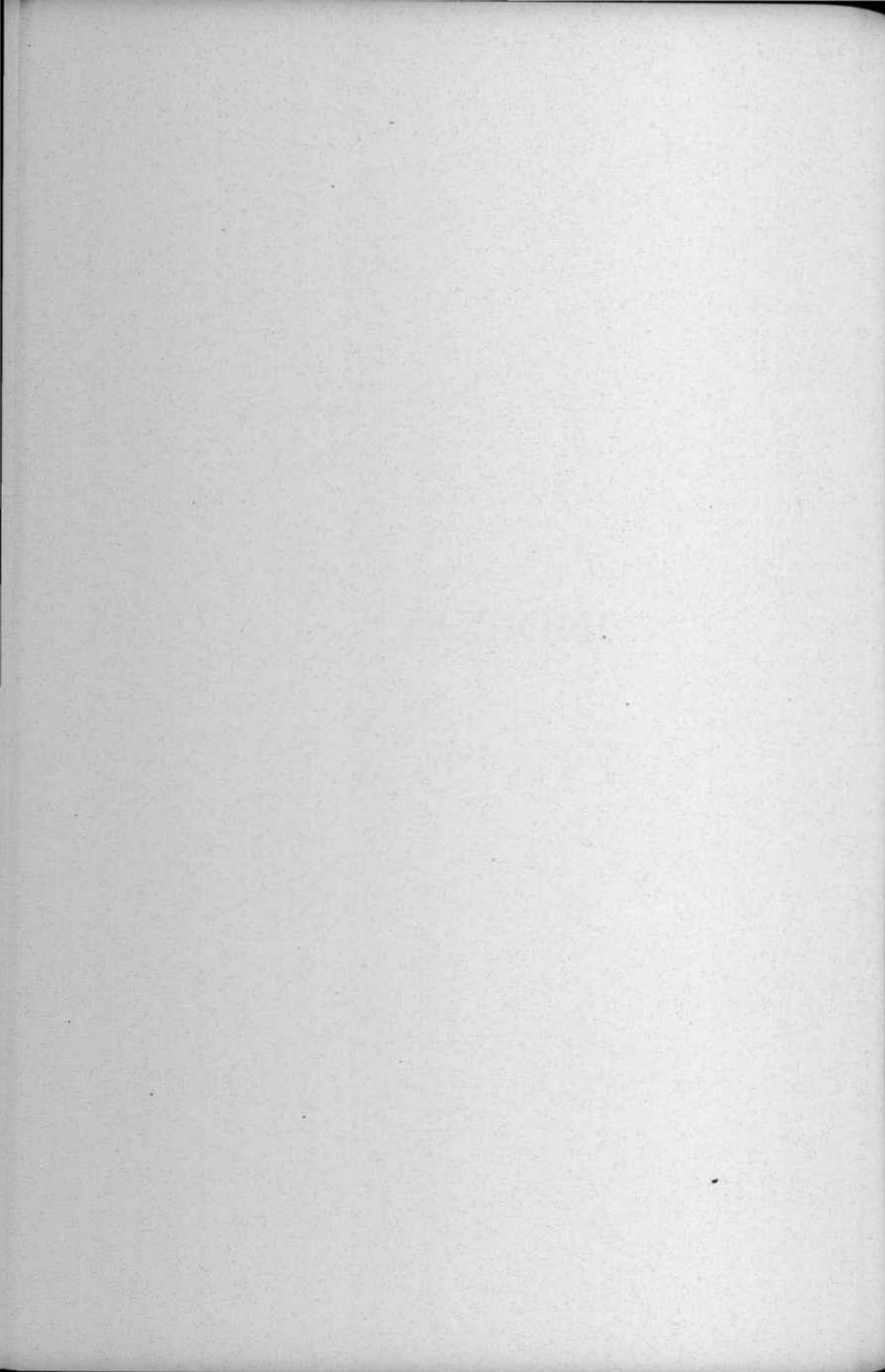
Governor's authority to call extraordinary reapportionment session expires 30 days after adjournment of Legislature's regular session. However, he could within such period issue call for such session at a definite time thereafter and, if the need for the session ceased to exist, could retract same. Advisory Opinion to the Governor, Florida, 1957, 96 So. 2d 413.

OFFICERS

Despite a statute providing that in judicial circuits composed of two or more counties the state attorney and the assistant state attorney should not reside in the same county, no vacancy was created in the office of assistant state attorney in such multi-county circuit, the incumbent of which had been duly appointed and confirmed for a four-year term, by the subsequent election of a state attorney who resided in the same county as the incumbent assistant state attorney. Advisory Opinion to the Governor, Florida, 1957, 92 So. 2d 513.



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